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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1934

No. 11

GEORGE W. McCANDLESS, AS RECEIVER OF DUQUESNE GAS CORPORATION, PETITIONER,

vs.

MAXIME H. FURLAUD, KINGSTON CORPORATION, BYRON CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 28, 1934

CERTIORARI GRANTED APRIL 30, 1934

SUPREME COURT OF THE UNITED STATES

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IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

GEORGE W. MCCANDLESS, as Receiver of Duquesne Gas Corporation, Complainant-Appellee-Appellant,

against

MAXIME H. FURLAUD and KINGSTON CORPORATION, Defendants-Appellants-Appellees, and Byron Corporation and Chaucer Corporation, Defendants-Appellees, and Carlos Reuter, Defendant

(Cross Appeals)

STATEMENT UNDER RULE XIII

This action was commenced by the service of a subpœna and bill of complaint on all of the above-named defendants with the exception of the defendant Carlos Reuter on March 24th, 1932.

Carlos Reuter was not served nor did he appear in the above action.

An amended bill of complaint was served and filed on or about the 3rd day of May, 1932.

[fol. 2] The defendants herein moved under equity Rule 20 to compel the complainant to make a further and better statement of the nature of the claim set forth in the amended bill of complaint.

An order was entered on or about the 23rd day of June, 1932 denying the application made on behalf of the defendants under equity Rule 20. The said order was signed by the Hon. Francis G. Caffey, one of the Justices of the United States District Court for the Southern District of New York.

On or about the 5th day of July, 1932, the above-named defendants except Reuter filed their respective answers to the amended bill of complaint herein.

The complainant is George W. McCandless, as Receiver of the Duquesne Gas Corporation.

Ehrich, Royall, Wheeler & Walter are the solicitors for the complainant.

The defendants are Maxime H. Furlaud, Kingston Corporation, Byron Corporation, Chaucer Corporation.

Eppstein & Hirshfield are the solicitors for the said defendants.

There has been no change of parties or attorneys since the commencement of this action.

The trial commenced before the Hon. John C. Knox, District Court Judge sitting in the United States District Court for the Southern District of New York on the 9th day of November, 1932.

A decree was made on the 11th day of May, 1933 and entered on the 12th day of May, 1933 in the sum of $1,834,-640.08 together with costs and disbursements, in favor of the complainant and against the defendants, Maxime H. [fols. 3 & 4] Furlaud and Kingston Corporation and dismissing the bill of complaint as to the defendants Byron Corporation and Chaucer Corporation on the merits without costs.

The notice of appeal of the defendants, Kingston Corporation and Maxime H. Furlaud, together with assignment of errors, bond for costs and the citation were filed on the 19th day of July, 1933 and the appeal was allowed on the said day.

The bond for costs was approved on the 20th day of July, 1933.

The notice of appeal of the complainant, together with assignment of errors, bond for costs and the citation were filed on the 9th day of August, 1933, and the appeal was allowed on the 10th day of August, 1933.

The bond for costs was approved on the 10th day of August, 1933.

[fol. 5] In United States District Court, Southern District of New York

In Equity. No. 66-185

George W. McCandless, as Receiver of Duquesne Gas Corporation, Complainant,

against

Maxime H. Furlaud, Carlos Reuter, Kingston Corporation, Byron Corporation and Chaucer Corporation, Defendants

Amended Bill of Complaint

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The complainant, as Receiver of Duquesne Gas Corporation, brings this, his amended bill of complaint, and alleges:

First: That this is a suit of a civil nature wherein the amount in controversy exclusive of interests and costs is in excess of the sum of $3,000.

Second: That the complainant is a resident of the City of Pittsburgh, and a resident and citizen of the Commonwealth of Pennsylvania; that Duquesne Gas Corporation is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania having its principal office in the City of Washington, Commonwealth of Penn-
[fol. 6] sylvania, which lies within the territorial limits of the United States District Court for the Western District of Pennsylvania.

Third: Upon information and belief that defendants Maxime H. Furlaud and Carlos Reuter are residents of the County of New York and of the Southern District of New York; that defendant Kingston Corporation is a corporation organized under the laws of the State of New Jersey; that defendant Byron Corporation is a corporation organized under the laws of the State of Delaware; and that defendant Chaucer Corporation is a corporation organized under the laws of the State of Delaware.

Fourth: That by an order duly made in the United States District Court, in and for the Western District of Pennsyl-

vania, upon the 19th day of January, 1932, in a suit in equity, entitled "Frank T. Harrington, Plaintiff, against Duquesne Gas Corporation, Defendant", In Equity No. 2554, which suit was consolidated with a suit entitled "Central Hanover Bank and Trust Company, as Trustee under First Mortgage of Duquesne Gas Corporation, dated as of March 15, 1930, Plaintiff, against Duquesne Gas Corporation, Defendant", In Equity No. 2577, the complainant herein was appointed Receiver of all the assets and property, including choses in action, of said Duquesne Gas Corporation, and the complainant has duly qualified and is now acting as such Receiver; that upon petition of the complainant as such Receiver duly filed in the United States District Court, in and for the Southern District of New York, an order was duly made on the 23rd day of March, 1932, by said last mentioned Court appointing said com- [fol. 7] plainant, George W. McCandless, as Ancillary Receiver of Duquesne Gas Corporation, which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit, and the complainant has duly qualified and is now acting as such Ancillary Receiver.

Fifth: Upon information and belief that on or about the 18th day of July, 1928, a corporation was organized under the laws of the State of New York named Furlaud & Company, Inc. the name of which was later changed to Furlaud, Reuter & Company, Incorporated and later changed to Winchelsea Holding Corporation, and a certificate of dissolution of which was filed on the 27th day of October, 1931; that defendants Maxime H. Furlaud, Carlos Reuter and/or their mere nominees or dummies were at all times the only stockholders of said corporation in this paragraph mentioned, and that they and/or their mere nominees or dummies were at all times the directors of said corporation, and that at the time of the filing as aforesaid of the certificate of dissolution of said corporation, said defendants Furlaud, Reuter and/or their mere nominees or dummies were all of the directors and stockholders of the corporation in this paragraph mentioned.

Sixth: Upon information and belief that the certificate of incorporation of said Duquesne Gas Corporation was filed in the office of the Secretary of the Commonwealth of Pennsylvania on the 13th day of February, 1930, and

since the completion of its organization shortly after that date has owned and operated natural gas wells, pipe lines and other property incidental thereto, all situated in the Western District of the State of Pennsylvania; the organi-
[fol. 8] zation of said Duquesne Gas Corporation was brought about by the defendants Maxime H. Furlaud and Carlos Reuter, and they acted as and were the promoters of such corporation. One Randolph C. Coleman, one McLane Tilton and one Frank A. Cabeen, Jr. were the original directors named in the certificate of incorporation and acted as such directors until the 7th day of April, 1930; said Coleman, Tilton and Cabeen were the mere nominees of defendants Furlaud and Reuter, and in all the acts which they performed as directors of said Duquesne Gas Corporation they acted merely at the behest of and under the instructions of said Furlaud and said Reuter. One Otto E. Schuller, one Thomas W. D. Duke, one Henry T. Wynn and one Charles C. Henderson, together with the defendants Furlaud and Reuter became directors of said Duquesne Gas Corporation on the 7th day of April, 1930, on which date said Coleman, Tilton and Cabeen resigned and ceased to act as directors. Said Schuller was an employee of defendants Furlaud and Reuter or of said corporation, sometimes known as Furland & Company, Inc. Said Duke was employed as an attorney at law by the defendants Furlaud and Reuter to draw the papers in carrying out the various proceedings herein alleged. They, as well as the said Wynn and Henderson, were the mere nominees of the defendants Furlaud and Reuter in acting as such directors and in all the steps taken by them as such directors they acted under the instructions and at the behest of said defendants Furlaud and Reuter.

Seventh: Upon information and belief that during or about the months of March and April 1930, defendants Furlaud and Reuter caused such steps to be taken by said Du-
[fol. 9] quesne Gas Corporation as to bring about the authorization of a first mortgage of $4,000,000 securing an issue of $4,000,000 of first mortgage bonds of Duquesne Gas Corporation, an indenture covering the issue of $1,000,000 of so-called Convertible 6½% Secured Gold Notes, and the issuance of 675,000 shares of no par value common stock.

Eighth: Upon information and belief that during or about the months of March and April 1930, the defendants Furlaud and Reuter acting through the above described corporation, then known as Furlaud & Company, Inc., made as the banking house of issue, a public offering of the $4,000,000 of said bonds at the offering price of 97½ and a public offering of the $1,000,000 of the said notes at 98, and through such banking house of said Furlaud & Company, Inc. stated in a bond circular publicly issued and advertised by them that, in the case of said bonds "These bonds were issued by the corporation in connection with the acquisition of properties and to provide cash for developments, extensions and other corporate purposes", and in the case of said notes that "These notes are issued by the corporation in connection with the acquisition of properties and to provide cash for developments, extensions and other corporate purposes"; that as a result of the steps so taken by the defendants Furlaud and Reuter at the time aforesaid, or shortly thereafter, the whole amount of said $4,000,000 of said bonds and of said $1,000,000 of said notes were issued and distributed to the public at said prices or at prices approximating the same, or at an aggregate purchase price for said bonds of approximately $3,900,000 and of said notes of $980,000, or at an aggregate sales price for both [fol. 10] said bonds and notes of approximately $4,800,000.

Ninth: Upon information and belief that at the time of the issuance, sale and distribution of said bonds and notes by the defendants Furlaud and Reuter, as aforesaid, said last mentioned defendants had made arrangements for the acquisition for said Duquesne Gas Corporation of various natural gas wells and properties situated in Southwestern Pennsylvania; that the aggregate price of said properties so arranged to be acquired for Duquesne Gas Corporation was $2,572,989; that during or about the month of April 1930, said gas properties were conveyed by the various owners thereof to said Duquesne Gas Corporation in consideration of the payment by Duquesne Gas Corporation of sums of money as the various purchase prices thereof aggregating the said sum of $2,572,989; that said sum of $2,572,989 was paid out of the proceeds of the sale of said bonds and notes.

Tenth: Upon information and belief that except for the payment as aforesaid for the benefit of said Duquesne Gas

Corporation of the said sum of $2,572,989 and except also for the payment into the treasury of said Duquesne Gas Corporation out of the proceeds of the sale of said bonds and notes of the sum of $365,000, and except for the payment out of the proceeds of the sale of such bonds and notes of such amount as may be considered a legitimate bankers' commission for the distribution and sale of said bonds and notes, and as may be considered proper organization expenses for the organization of Duquesne Gas Corporation, said Duquesne Gas Corporation received nothing [fol. 11] either directly or indirectly out of the approximately $4,880,000, which was the proceeds of the sale of said bonds and notes.

Eleventh: The the defendants Furlaud and Reuter caused all of the proceeds of the sale of said bonds and notes beyond the amount of said sum of $2,572,989 plus said sum of $365,000 (other than the legitimate bankers' commissions for the sale of said bonds and notes and legitimate expenses of organization of said corporation) to be diverted from the Duquesne Gas Corporation for whose use and benefit the proceeds of the sale of said bonds and notes was intended and defendants Furlaud and Reuter fraudulently misappropriated said moneys to their own use.

Twelfth: That defendants Furlaud and Reuter caused said Duquesne Gas Corporation to issue to them or to their nominees or dummies, including the defendants Kingston Corporation, Byron Corporation and Chaucer Corporation, 675,000 shares of the capital stock of said Duquesne Gas Corporation and sold 85,000 shares thereof in the name of defendants Byron Corporation and Chaucer Corporation for the sum of $850,000 cash, which sum of $850,000 was retained by the defendants Furlaud and Reuter and converted to their own uses through the agency of said last two mentioned defendant corporations.

Thirteenth: Upon information and belief that said Duquesne Gas Corporation has received out of the proceeds of the sale of said bonds and said notes, as well as out of the sale of said 85,000 shares of stock, or in consideration for the issuance of the balance of said 675,000 shares of stock, [fol. 12] nothing whatsoever except that, as aforesaid, it received the title to the gas properties purchased for it by de-

fendants Furlaud and Reuter at a cost of $2,575,989 and $365,000 of working capital and whatever benefits arose from the organization of the corporation and from the services of the defendants in selling its securities.

Fourteenth: Upon information and belief that defendants Furlaud and Reuter were the promoters of said Duquesne Gas Corporation; that they caused it to be organized; that all the steps which were taken for the consummation of its incorporation, organization, issuance of its said bonds, notes and stock were taken under the direction and at the behest of defendants Furlaud and Reuter; that they stand in a fiduciary relation to said Duquesne Gas Corporation; that defendants Furlaud and Reuter are accountable to the corporation for the proceeds derived from the issuance and sale by them as aforesaid of all of said securities of said corporation.

Fifteenth: Upon information and belief that the moneys diverted by defendants Furlaud and Reuter from the proper uses of said Duquesne Gas Corporation and misappropriated by defendants Furlaud and Reuter (even after the allowance of a fair and proper banking commission for the sale of said securities and after a fair and proper allowance for the expenses of the organization of Duquesne Gas Corporation) is not less than $2,500,000.

Sixteenth: Upon information and belief that the follow-
[fol. 13] ing were some of the additional steps taken by defendants Furlaud and Reuter in connection with the organization of said Duquesne Gas Corporation, the acquisition of its said gas properties and the issuance of its said securities and the diversion and misappropriation of its funds:

Defendants Furlaud and Reuter caused to be organized under the laws of the State of New Jersey the defendant Kingston Corporation, of which corporation they or their mere nominees or dummies were the only stockholders and of which they or their mere nominees or dummies were the only directors and officers; that defendants Furlaud and Reuter also caused to be organized under the laws of the State of Delaware the defendant Byron Corporation, that the stockholders of said Byron Corporation were defendants Furlaud and Reuter or mere nominees and dummies of Furlaud and Reuter, and the directors and officers of said

Byron Corporation were mere nominees or dummies of said Furlaud and Reuter; that defendants Furlaud and Reuter also caused to be organized under the laws of the State of Delaware the defendant Chaucer Corporation, that the stockholders of said Chaucer Corporation were defendants Furlaud and Reuter or mere nominees and dummies of Furlaud and Reuter, and the directors and officers of said Chaucer Corporation were mere nominees or dummies of said Furlaud and Reuter; that option agreements for the purchase of the various gas properties which were acquired as aforesaid for said Duquesne Gas Corporation were taken in the name of defendant Kingston Corporation, the sum total of which option prices was $2,572,989; that defendants Furlaud and Reuter also caused a contract to be made be- [fol. 14] tween said corporation, sometimes known as Furlaud & Company, Inc., and Duquesne Gas Corporation for the sale by Duquesne Gas Corporation to said Furlaud & Company, Inc. of $2,700,000 of said bonds and $1,000,000 of said notes, the contract price being 90 for said bonds and 88 for said notes, or an aggregate contract price of $3,310,000; that before the issuance and delivery of said bonds and notes which were sold as aforesaid, defendants Furlaud and Reuter arranged with the sellers of the several properties (the optioners) that such sellers or optioners should deposit in escrow in various banks situated in several towns in Western Pennsylvania convenient to the optioners, title papers conveying direct to Duquesne Gas Corporation said several gas properties under escrow agreements providing that upon drafts upon the Duquesne Gas Corporation for the respective purchase prices being taken up and paid, said title papers should be definitively delivered; that the date for definitive deliveries and the payment of the respective purchase prices was adjourned from time to time to correspond with the date for the delivery to various investment houses under the bankers syndicate for the sale of said bonds and notes and the receipt of the purchase price of said securities; that on the 7th day of April, 1930, delivery was made of a large part of said bonds and all of said notes and on that day drafts were taken up and paid out of the proceeds of the sale of said bonds and notes for the purchase price of said several gas properties; that the amount of the purchase price of said several gas properties was said sum of $2,572,989; that under date of April 7, 1930, a

written paper called "Agreement of Reorganization be-
[fol. 15] tween Duquesne Gas Corporation and Kingston Corporation of New Jersey" was signed, which bears the signatures of "Kingston Corporation by M. A. Furlaud, President, attested Robert Halporn, Assistant Secretary" and of "Duquesne Gas Corporation by Walter G. Krog, Vice-President, by Robert Halporn, Assistant Secretary"; that said Krog and Halporn were both employees of defendants Furlaud and Reuter or of said corporation hereinabove described, sometimes known as Furlaud & Company, Inc.; that under said so-called agreement of reorganization for an alleged consideration of the transfer by defendant Kingston Corporation to said Duquesne Gas Corporation of said gas properties, said Duquesne Gas Corporation agreed to pay $3,015,000 stated to be the amount which defendant Kingston Corporation would be obligated to pay at the Central Hanover Bank and Trust Company and by which said Duquesne Gas Corporation also agreed to issue and deliver to said Kingston Corporation 535,000 shares of its common stock and $1,300,000 in principal amount of its 6% Mortgage Convertible Gold Bonds; that soon thereafter defendant Kingston Corporation went through the form of granting options to various employees or dummy corporations of defendants Furlaud and Reuter or of said corporation, sometimes called Furlaud & Company, Inc., for the purchase at 50c a share of 510,000 shares of said capital stock of said Duquesne Gas Corporation, which so-called options were then caused by defendants Furlaud and Reuter to be assigned to the extent of 255,000 shares each to defendants Byron Corporation and Chaucer Corporation; immediately or soon after the 7th day of April, 1930, defendants Furlaud and Reuter caused defendant Kingston [fol. 16] Corporation to go through the form of declaring a dividend in kind to its stockholders of said $1,300,000 in face amount of bonds of Duquense Gas Corporation and 25,000 shares of the capital stock of Duquesne Gas Corporation; that defendants Furlaud and Reuter caused the original 1,000 shares of the capital stock of said Duquense Gas Corporation to be subscribed for by three individuals who are mere nominees or dummies of defendants Furlaud and Reuter, which subscriptions were assigned to said corporation sometimes known as Furlaud & Company, Inc., and defendants Furlaud and Reuter caused a subscription

for 139,000 additional shares to be made by said Furlaud & Company, Inc., and accepted by Duquesne Gas Corporation at 50c a share, or a total of 140,000 shares; that thereafter defendants Furlaud and Reuter acting through defendants Byron Corporation and Chaucer Corporation sold 85,000 of said last mentioned shares at $10 a share to one J. J. Bergen for the total sum of $850,000 in cash and as an incident thereto caused said shares of stock to be listed on the New York curb market; that the purchase price of $850,000 for said 85,000 shares of stock was received to the extent of $425,000 thereof by defendant Byron Corporation and to the extent of $425,000 thereof by defendant Chaucer Corporation; that thereafter defendants Furlaud and Reuter organized what is known as the Secondary Syndicate for the sale of $1,300,000 in face amount of the bonds of Duquesne Gas Corporation which were received by them as above stated through the mechanism of said Kingston Corporation; that said additionl bonds were to be sold by the distributing group of security dealers organized by the defendants to public investors at the price then (August 1930) [fol. 17] prevailing on the New York Curb for such bonds which was about 86; that all of said additional $1,300,000 of bonds were sold at about that time and about that price less a commission to dealers varying from two to four points according to the amount of bonds placed by such dealers and that defendants Furlaud and Reuter either directly or through said corporation, sometimes known as Furlaud & Company, Inc. received from the proceeds of the sale thereof the sum of approximately $1,100,000.

Seventeenth: That the complainant, as Receiver, is entitled on behalf of Duquesne Gas Corporation to have the defendants account to the corporation for the funds or moneys coming into their hands or into the hands of any of them or their agents or representatives from the sale of the securities of said Duquesne Gas Corporation or of any of said securities, and for the disposition made of such funds or moneys and to make restitution for any or all of such funds or moneys wrongfully diverted from Duquesne Gas Corporation and misappropriated or converted by the defendants or any of them to their own uses and for any or all secret or excessive profits taken or retained by them or any of them; that your complainant has no adequate

remedy at law and your complainant's rights may only be properly adjudicated in this Court of Equity.

Wherefore, your complainant prays as follows:

I. That the defendants Maxime H. Furlaud, Carlos Reuter, Kingston Corporation, Byron Corporation and Chaucer Corporation, and each of them, be compelled and required to account to said Duquesne Gas Corporation and [fols. 18-44] to complainant as Receiver of said Duquesne Gas Corporation for all funds or moneys coming into the hands of them or any of them or of the agents or representatives of any of them or in the hands of any one else acting with or for them from the sale of the bonds, notes and shares of stock of said Duquesne Gas Corporation.

II. That the Court shall decree the payment by the defendants and each of them to the complainant as Receiver of Duquesne Gas Corporation of such sum or sums of money as said Duquesne Gas Corporation or your complainant as its Receiver shall appear upon such account to be entitled.

III. The complainant prays for such other and further relief as to the Court appears to be just.

IV. That process of subpœna issue herein in due course directed to the defendants herein and each of them.

Ehrich, Royall, Wheeler & Walter, Solicitors for the Complainant. Office & P. O. Address: 20 Exchange Place, Borough of Manhattan, New York City. Ralph Royall and Clark Miller and William A. Magee, of Pittsburgh, of Counsel.

(Verified on April 27, 1932, by George W. McCandless.)

[fol. 45] In United States District Court, Southern District of New York

In Equity. No. 66-185.

[Title omitted]

Answer of Kingston Corporation

Kingston Corporation, for answer to the amended bill of complaint herein:

1. Admits the allegations of Paragraph "First" of the amended bill of complaint.

2. Denies any knowledge or information sufficient to form a belief as to whether complainant is a resident of the City of Pittsburgh and a resident and citizen of the Commonwealth of Pennsylvania, and admits the other allegations of paragraph "Second" of the amended bill of complaint.

3. With respect to the allegation of paragraph "Fourth" of the amended bill of complaint, defendant denies having information sufficient to form a belief with respect thereto and leaves the complainant to his proof thereof.

[fol. 46] 4. With respect to paragraph "Fifth" of the amended bill of complaint, defendant denies each and every allegation thereof except that it admits that on or about the 18th day of July, 1928, a corporation was organized and existed under the laws of the State of New York named "Furlaud & Company, Inc.", the name of which was later changed to "Furlaud, Reuter & Co., Incorporated" and later changed to "Winchelsea Holding Corporation", a certificate of dissolution of which was filed on the 27th day of October, 1931.

5. With respect to paragraph "Sixth" of the amended bill of complaint, defendant denies each and every allegation thereof except that it admits that Duquesne Gas Corporation was duly incorporated under the laws of the State of Pennsylvania and that it owned and operated natural gas wells and admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc. caused the organization of Duquesne Gas Corporation; that Randolph C. Coleman, McLane Tilton and Frank A. Cabeen, Jr., acted for and on behalf of Winchelsea Holding Corporation, then known as Furlaud & Company, Inc.; and that Otto E. Schuller, Thomas W. Duke, Henry T. Wynn and Charles C. Henderson were all employed by or acted on behalf of Winchelsea Holding Corporation then known as Furlaud & Company, Inc.

6. With reference to paragraph "Seventh" of the amended bill of complaint, defendant denies each and every allegation thereof but admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., caused Duquesne Gas Corporation to authorize a first mortgage

of Four million dollars ($4,000,000) securing an issue of [fol. 47] Four million dollars ($4,000,000) of first mortgage bonds of Duquesne Gas Corporation, and caused an indenture of One million dollars ($1,000,000) to be issued covering the issue of One million dollars ($1,000,000) of Convertible 6½% Secured Gold Notes, and caused the issuance of Six hundred and seventy-five thousand (675,000) shares of no par value Common Stock of Duquesne Gas Corporation.

7. With respect to paragraph "Eighth" of the amended bill of complaint, defendant denies each and every allegation contained therein but admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., purchased from Duquesne Gas Corporation and others, certain bonds and notes of Duquesne Gas Corporation and resold some of the said bonds and notes to others.

8. With respect to paragraph "Ninth" of the amended bill of complaint, defendant denies each and every allegation contained therein.

9. With respect to paragraph "Tenth" of the amended bill of complaint, defendant denies each and every allegation and alleges that all of the bonds, notes and stock of Duquesne Gas Corporation were issued in consideration of the payment to Duquesne Gas Corporation of sundry sums of money and/or the transfer to it of properties or other things of value of the fair, reasonable and/or appraised value of the amount of the bonds and/or notes issued and that immediately after the issuance of the said bonds, notes and stock Winchelsea Holding Corporation and/or defendants Furlaud, Reuter, Kingston Corporation, Byron Corporation and/or Chaucer Corporation and/or the nominees [fol. 48] of them or of one or more of them were the holders of all of the issued and outstanding stock of the said Duquesne Gas Corporation.

10. With respect to paragraph "Eleventh" of the amended bill of complaint, defendant denies each and every allegation thereof and alleges that each and every sale of a bond or note of Duquesne Gas Corporation as alleged in the amended bill of complaint was made for the account of the Seller thereof who was the owner thereof and not for the account of Duquesne Gas Corporation.

11. With respect to paragraph "Twelfth" of the amended bill of complaint, defendant denies each and every allegation thereof and alleges that each and every share of stock issued by the Duquesne Gas Corporation was properly issued by the said Duquesne Gas Corporation for a good and valuable consideration, and resold by the person, firm or corporation (or the nominee of the said person, firm or corporation) to whom the stock was originally issued, for the account of that person, firm or corporation and not for the account of Duquesne Gas Corporation.

12. With respect to paragraph "Thirteenth" of the amended bill of complaint, defendant denies each and every allegation thereof.

13. With respect to paragraph "Fourteenth" of the amended bill of complaint, defendant denies each and every allegation thereof.

14. With respect to paragraph "Fifteenth" of the amended bill of complaint defendant denies each and every allegation thereof.

[fol. 49] 15. With respect to paragraph "Sixteenth" of the amended bill of complaint, defendant denies each and every allegation thereof except that defendant admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., organized and was (through its nominees) the sole stockholders of Kingston Corporation, that Winchelsea Holding Corporation then known as Furlaud & Company, Inc., purchased from Duquesne Gas Corporation, Two million seven hundred thousand dollars ($2,700,000) of bonds and One million dollars ($1,000,000) of notes at a price of 90 for the bonds and 88 for said notes, and further admits that under date of April 7, 1930 a written paper called "Agreement of Reorganization between Duquesne Gas Corporation and Kingston Corporation of New Jersey" was duly signed and executed, and further admits that Krogg and Halporn were employees of Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., and further admits that Kingston Corporation declared a dividend in kind to its stockholders of One Million three hundred thousand dollars ($1,300,000) in face amount of bonds of Duquesne Gas Corporation and Twenty-five thousand (25,000) shares of the capital stock of Duquesne Gas Cor-

poration and further admits that Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., subscribed and paid for One hundred and forty thousand (140,000) shares of stock of Duquesne Gas Corporation and paid therefor at the rate of fifty cents (50c.) per share, and further admits that the said Winchelsea Holding Corporation, then known as Furlaud & Company, Inc., sold the major part of the One million three hundred thousand dollars [fol. 50] ($1,300,000) in face amount of bonds which were received by it from Kingston Corporation.

16. With respect to paragraph "Seventeenth" of the amended bill of complaint, defendant denies each and every allegation thereof.

The defendant, without waiving any of the foregoing defenses and further answering said amended bill of complaint, alleges:

17. Upon information and belief, that the original subscribers to the capital stock of Duquesne Gas Corporation and each and every other person (or the person, persons, firm, firms, corporation or corporations for whom it or they were acting) who, from the inception of Duquesne Gas Corporation until on or about May 15, 1930, was either a stockholder of the said company or a subscriber for stock of said company or in any way otherwise interested in the stock of the company then issued or thereafter to be issued, had full knowledge of the corporate transactions referred to in the amended bill of complaint and of all matters affecting the same and with such knowledge approved the corporate transactions referred to in the amended bill of complaint and from time to time re-elected the directors who had authorized the same and ratified and affirmed said transaction by their acquiescence thereto and that at a meeting of the stockholders of Duquesne Gas Corporation duly held on April 8, 1930, at which all of the issued and outstanding stock of the corporation was present in person or by proxy, all of the acts set forth in the amended bill of [fols. 51-182] complaint were, by unanimous vote, ratified and confirmed and that the defendants, Furlaud, Reuter, Kingston Corporation, Chaucer Corporation and/or Byron Corporation and/or Winchelsea Holding Corporation and/or their nominees owned and/or controlled, at all pertinent times mentioned in the amended bill of complaint all

of the issued, outstanding and/or subscribed stock of Duquesne Gas Corporation.

Wherefore defendant prays that the amended bill of complaint be dismissed and it have such other and further relief as to the Court appears to be just.

Eppstein & Hirshfield, Solicitors for Kingston Corporation, Office & P. O. Address: 521 Fifth Avenue, Borough of Manhattan, City of New York.

(Verified on June 22, 1932, by Maxime H. Furlaud as President of Kingston Corporation.)

(Similar answers were interposed by defendants Maxime H. Furlaud, Byron Corporation and Chaucer Corporation.)

[fol. 183] PLAINTIFF'S EXHIBIT 1

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FRANK T. HARRINGTON, Complainant,

against

DUQUESNE GAS CORPORATION, Defendant

PETITION OF GEORGE W. MCCANDLESS

To the Honorable Judges of the United States District Court for the Southern District of New York:

The petition of George W. McCandless, Receiver, shows to this Honorable Court:

First: That on the 19th day of January, 1932, your petitioner by a per curiam decree duly made by the United States District Court for the Western District of Pennsylvania, was duly appointed receiver of the assets, lands, tenements and hereditaments of the defendant, the Duquesne Gas Corporation, and all of its property, real and personal, including choses in action, and was required to file a bond in the penal sum of Fifty thousand dollars ($50,000).

Second: That your petitioner has duly accepted the trust in him reposed and has duly filed a bond as directed by said decree.

Third: That defendant is a corporation organized under and existing by virtue of the laws of the State of Penn- [fol. 184] sylvania, with its principal office in the City of Washington, Washington County, Pennsylvania, and that its principal business is the business of producing and selling natural gas.

Fourth: That the aforesaid decree appointing your petitioner as receiver, was granted upon the amended bill of complaint in the above-entitled action, duly filed in the United States District Court for the Western District of Pennsylvania, upon the answer of the defendant Duquesne Gas Corporation to said amended bill of complaint. Attached hereto and made a part hereof are exemplified copies of said amended bill of complaint, said answer and the decree appointing your petitioner receiver in said suit in the United States District Court for the Western District of Pennsylvania.

Fifth: That by the aforesaid decree the above entitled action was consolidated with an action brought in the District Court of the United States for the Western District of Pennsylvania by the Central Hanover Bank and Trust Company, as trustee under the first mortgage of the Duquesne Gas Corporation against said Duquesne Gas Corporation, and said decree appointed your petitioner as receiver in the consolidated action and that at all times subsequent to his qualification your petitioner has acted as receiver in the consolidated action.

Sixth: That the solicitors for said Frank T. Harrington, said Duquesne Gas Corporation and said Central Hanover Bank and Trust Company, as trustee, consented to the entry of said decree.

[fol. 185] Seventh: That on the basis of investigations conducted by your petitioner, your petitioner believes that the Duquesne Gas Corporation has a good cause of action against the promoters of defendant Duquesne Gas Corporation including Maxime H. Furlaud and Carlos Reuter for an accounting and for the restitution of funds fraudulently diverted and misappropriated and of secret and excessive

profits. Your petitioner as such receiver has retained the firm of Ehrich, Royall, Wheeler & Walter of the City of New York to take such proceedings as are necessary and proper for the purposes of bringing such suit in this district.

Eighth: That your petitioner is informed that said Maxime H. Furlaud and Carlos Reuter are residents of the County of New York which lies within the territorial limits of the District Court of the United States for the Southern District of New York.

Ninth: That your petitioner verily believes that it is necessary for the protection of the interests of the creditors and stockholders of said Duquesne Gas Corporation and for the interest of the corporation itself, that an ancillary receiver be appointed by this court for the purpose of instituting such action in this district.

Tenth: That no previous application for the relief herein sought has been made.

Wherefore, your petitioner prays for a decree of this court appointing an ancillary receiver of Duquesne Gas Corporation in and for the Southern District of New York [fol. 186] with all rights and powers to carry into force and effect the decree of the court of original jurisdiction, and to bring an action against said promoters for an accounting and for the restitution of funds fraudulently diverted and misappropriated and of secret and excessive profits, and to petition for an order to retain solicitors for that purpose, and to do any and all things necessary in connection therewith for the protection of the interests of the estate; and restraining the defendant, its agents, servants, attorneys, creditors and stockholders, and all persons from interfering in any manner with said ancillary receiver in effecting such purposes.

Dated New York, March 23, 1932.

George W. McCandless, Petitioner.

(Verified by George W. McCandless on March 23, 1932.)

[fol. 187] IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

FRANK T. HARRINGTON, Complainant,

against

DUQUESNE GAS CORPORATION, Defendant

AFFIDAVIT OF GEORGE W. McCANDLESS

STATE OF NEW YORK,
County of New York, ss:

George W. McCandless, being duly sworn, deposes and says: I am the petitioner in the annexed petition; to the best of my knowledge there are no suits now pending against the defendant corporation for the appointment of a receiver save as set forth in said petition and save that an application has been made for the appointment of an ancillary receiver in the United States District Court for the District of West Virginia but that said application has not been prosecuted as it was discovered that your deponent's supposition that the defendant corporation owned property in West Virginia was erroneous.

George W. McCandless.

Sworn to before me this 23rd day of March, 1932.
Hazel E. Applegate, Notary Public.

[fol. 188] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity.

FRANK T. HARRINGTON, Complainant,

against

DUQUESNE GAS CORPORATION, Defendant

AMENDED BILL OF COMPLAINT, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

To the Honorable the Judges of the District Court of the United States for the Western District of Pennsylvania:

The complainant for himself and all other stockholders, bondholders, noteholders and creditors of the defendant corporation, who, being interested in the subject matter of this suit should become parties complainant hereto and contribute to the expenses hereof, brings this, his amended bill of complaint:

1. The complainant re-affirms the allegations contained in the first paragraph of his bill of complaint as filed to the effect that this is a suit of a civil nature in equity wherein there is involved a controversy wholly between citizens of various states and wherein the matter and amount in controversy, exclusive of interest and costs, exceeds the sum or value of $3,000.00.

[fol. 189] 2. The complainant re-affirms the allegations contained in the second paragraph of his bill of complaint to the effect that he is a resident and citizen of the City of New York, in the State of New York, and is the owner of 100 shares of non-assessable common stock without nominal or par value, of the defendant corporation. He further avers that although the stock has been but recently transferred into his name, he has been the actual owner of the same in the name of Henry B. H. Ripley since September 5, 1930.

3. The complainant further avers that the defendant is a public utility corporation organized under the laws of the State of Pennsylvania in the year 1930 and at the present time has its principal office in the City of Washington, Washington County, Pennsylvania.

4. The complainant avers upon information and belief that the stockholders, bondholders and noteholders of the defendant are very many in number and are citizens and residents of many states in the United States and for that reason it is impossible for the complainant to join them in this action and the complainant brings this action not only for his own benefit, but also for and on behalf of all other stockholders, bondholders and noteholders of the defendant and in order that their respective rights and equities may be preserved and protected.

5. That the said defendant corporation has an authorized capital stock of Five million (5,000,000) shares without nominal or par value and that it has issued up to the

[fol. 190] present time six hundred and ninety thousand (690,000) of said shares. It further avers that the said defendant corporation owns or operates, either directly or through its subsidiaries, natural gas properties in Pennsylvania and West Virginia.

6. The complainant is informed, believes and therefore avers that practically all of the defendant corporation's gross income since its incorporation has been derived from the transportation, distribution and sale of natural gas to public utility corporations and industrial enterprises, and through a subsidiary to domestic consumers, all in the vicinity of the City of Pittsburgh.

7. The complainant is informed, believes and therefore avers that the principal assets of the defendant corporation are the property owned or leased, managed and operated through it and its subsidiaries consisting of over one hundred and twenty-five (125) gas wells in approximately fourteen thousand (14,000) acres of gas properties within a radius of from seven (7) to forty-five (45) miles of the City of Pittsburgh, and that it further owns pipe, equipment, machinery, etc.

8. The liabilities of the said defendant corporation are as follows:

(a) Four million ($4,000,000) Dollars First (closed) Mortgage 6% Convertible Gold Bonds, dated March 15, 1930, and which bear interest at the rate of 6% per annum, payable March 15th and September 15th in every year, aggregating at the present time $3,965,000. and will mature March 15, 1945, for the payment of which the defendant [fol. 191] corporation is distinctly liable. That interest on the said bonds due September 15, 1931, is in default and has continued in default for a period of more than thirty days.

(b) One million ($1,000,000) Dollars Convertible 6½% Secured Notes, dated March 15, 1930, maturing March 15, 1935, aggregating at the present time $949,000. for the payment of which the defendant corporation is directly liable. That interest on the said notes due September 15, 1931, is in default and has continued in default for a period of more than thirty days thereafter.

9. That in addition to its inability to provide sufficient reserve with which to meet the above mentioned interest on the first mortgage bonds, the corporation has carried on its business at a loss throughout the year 1930 and 1931.

10. The complainant is informed, believes and therefore avers that the company will continue to operate at a loss even without meeting its interests payments on account of bonds and notes, unless a complete reorganization of its business and affairs is accomplished.

11. The complainant is informed, believes and therefore avers that the defendant will not have sufficient funds to enable its business to be properly continued unless a receiver or receivers be appointed who can borrow the necessary funds subject to the approval of this Court, or in some other manner reorganize the said corporation. That such action is especially necessary in view of the fact that certain [fol. 192] contracts which the defendant has entered into can be realized upon at a profit only if the business, as a whole, can be carried on without interruption; and that unless this Honorable Court in view of the present inability of the defendant to meet its due and maturing obligations, will deal with the properties of the defendant as a whole as a trust fund for the payment of its creditors and stockholders and bondholders as their several interests therein shall appear, such properties will be dissipated, wasted and sacrificed, and interminable litigation will ensue to the great irreparable damage and injury of the complainant and the creditors and other stockholders, bondholders and noteholders of the defendant.

12. The complainant is informed, believes and therefore avers as follows:

Furlaud Reuter & Company, investment bankers of New York City, arranged the acquisition of the properties now owned or leased by defendant, Duquesne Gas Corporation and did acquire the same at a total cost of $2,527,250. Other expenses were incurred such as engineering, auditing, attorney fees, commissions, etc., amounting to $487,750 and working capital of $365,000 was provided, making total actual costs in connection with the acquisition of the properties of approximately $3,380,000. Title to the properties

was taken in Kingston Corporation, a corporation organized by and under the laws of the Commonwealth of Pennsylvania on May 28, 1930 with a directorate identical in personnel to that of defendant upon its organization, both of which corporations were owned and controlled at that [fol. 193] time by said Furlaud Reuter & Company. The properties were at once transferred to Duquesne Gas Corporation, defendant, at a profit to said Kingston Corporation of approximately $1,500,000.

13. The complainant is informed, believes and therefore avers as follows:

That said Furlaud Reuter & Company originally employed one Ralph E. Davis, a well known civil engineer, to appraise the various properties to be acquired for the defendant. Pursuant to said employment the said Davis appraised a portion thereof at $1,743,520 and upon his indication that his appraisal of the balance of the properties would be less than $1,000,000, a representative of said Furlaud Reuter & Company took the data upon which he was working to their offices in New York. Thereupon, and without notice to said Davis, the said Furlaud Reuter & Company employed the firm of Mattison, Davey & Winters to complete the appraisements, and that firm fixed the figure of $4,929,787 as the appraised value of the said balance of said properties. The complainant is informed, believes and therefore avers that at the present time, with gas reserves, the properties are worth in the aggregate approximately $3,200,000.

14. The complainant is informed, believes and therefore avers as follows:

The said 6% Convertible Gold Bonds in the amount of $4,000,000 at par was sold by the said Furlaud Reuter & Company, and/or their nominees, to the public at $975 each or $3,900,000 and of said sum the defendant corporation [fol. 194] received the benefit of but $900. each or $3,600,000., the balance being retained by said Furlaud Reuter & Company and/or their nominees.

15. The complainant is informed, believes and therefore avers as follows:

That the said 6½% Gold Notes in amount $1,000,000 at par, were sold by the said Furlaud Reuter & Company

and/or their nominees to the public at $980 each or $980,000 and of said sum the defendant corporation received the benefit of but $880 each or $880,000, the balance being retained by said Furlaud Reuter & Company and/or their nominees.

16. The complainant is informed, believes and therefore avers as follows:

That in the capitalization of the defendant, Duquesne Gas Corporation, the said Furlaud Reuter & Company caused the total amount of stock, actually issued at that time, to-wit, 675,000 shares to be issued to them or their nominees at the stated price in the capital structure of the said defendant of 50c. per share, or a total of $387,500, some of which said stock was sold by them or their said nominees at various prices up to $9.00 per share, as a result of which said Furlaud Reuter & Company and/or their nominees acquired a net profit in excess of $800,000, none of which said profit was accounted for or was of benefit to the said defendant, Duquesne Gas Corporation.

17. The complainant is informed, believes and therefore avers that aside from the Bondholders' Protective Commit-
[fol. 195] tee, of which he is a member, and which has filed a petition to intervene in these proceedings, another so-called Bondholders' Protective Committee under the influence of the said Furlaud Reuter & Company and/or their nominees and associates has attempted to suppress the facts surrounding the fraudulent incorporation and capitalization of the defendant by compelling the trustee of the said First Mortgage Bonds to bring foreclosure proceedings against the defendant corporation without allowing any opportunity whatsoever for a possible reorganization of the business and affairs of the defendant, and your complainant is informed, believes and therefore avers that in the proceeding to foreclose, petitions to intervene have been or will be filed by the Bondholders' Protective Committee of which he is a member, and which has revoked the authority given to the trustee in the said mortgage indenture, and likewise by certain other noteholders and stockholders of the defendant.

18. The complainant is informed, believes and therefore avers that proceedings have been instituted in a State Court

of the State of New York in the City of New York, in which alone can jurisdiction be obtained, against the said Furlaud Reuter & Company, is officers, directors, associates and counsel for restitution of all monies and property improperly converted by them from the credit of said Duquesne Gas Corporation, in which said suit was restitution all stockholders, bondholders, noteholders and creditors of said Duquesne Gas Corporation are or should be interested.

[fol. 196] 19. The complainant further avers that the Bondholders' Protective Committee of which he is a member was on November 24, 1931 permitted by the Public Service Commission of the Commonwealth of Pennsylvania to intervene in proceedings instituted by said Commission against the defendant, Duquesne Gas Corporation, to determine its status as a public utility and to determine whether it has been properly organized, incorporated and financed, and that the said Bondholders' Protective Committee is cooperating with the said Public Service Commission of Pennsylvania in its effort to work out a solution of the affairs of the defendant corporation or to reorganize its business and enable it to continue.

20. The complainant has no adequate remedy at law and only through the intervention of this Honorable Court through the appointment of a receiver or receivers for the defendant corporation can full relief be granted, or the rights of your complainant and other stockholders, bondholders, noteholders and creditors be protected.

Wherefore, the complainant being without adequate remedy at law, and in need of the protection of a Court of Equity in securing his rights respectfully prays as follows:

1. That this Honorable Court appoint forthwith a receiver or receivers of all and singular the property of the defendant corporation, of whatsoever nature, with full power to take into his or their possession, hold and manage the same under the direction of this Court, with such [fol. 197] powers as this Court may from time to time grant in its discretion, to bring suit for, collect, receive and take into his or their possession all the property and assets of the defendant corporation, including its books, records, vouchers, checks, moneys, real estate and all other property, real, personal and mixed; to institute, prosecute, be-

come parties to, intervene, compromise or defend any actions at law, or in equity or in any statute for the recovery, protection and maintenance of any of the assets or properties of the defendant corporation, as he or they may deem proper or necessary, including the institution and prosecution of any such ancillary proceedings as he or they may deem advisable; to settle, collect, compound, adjust or make allowances upon any debts that may be due or owing to the defendant corporation as he or they may deem proper; to pay any such claims or wages as may have priority, and in general, with all the usual powers of receivers in such cases.

2. That the officers, managers, employees, creditors, stockholders, bondholders and noteholders of the defendant corporation and all other persons, firms and corporations be forthwith required to transfer, convey and deliver up to such receiver or receivers possession of all property of the defendant corporation wheresoever situated.

3. That all persons, firms and corporations be enjoined forthwith from instituting, commencing, prosecuting or continuing the prosecution of any actions, suits, or proceedings at law or in equity or under any statute against defendant corporation, from levying or serving any attach-
[fol. 198] ments or executions or other processes upon the defendant corporation save and except the filing of mechanics' or other stautory liens and generally that all persons, firms and corporations be enjoined from doing any act to interfere with said receivers in their possession of the property of the defendant corporation.

4. That your complainant may have such other and further relief as may be just or proper.

Patterson, Sherrard & Miller, Solicitors for Complainant.

(Verified by Frank T. Harrington, December 31, 1931.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity

FRANK T. HARRINGTON, Complainant,

vs.

DUQUESNE GAS CORPORATION, Defendant

AMENDMENT TO PRAYER, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

The complainant for himself and all other stockholders, bondholders, noteholders and creditors of the defendant corporation hereby amends the prayer of his amended bill of complaint so that it shall read as follows:

[fol. 199] 1. That the rights of the complainant and all other stockholders, bondholders, noteholders and creditors of the defendant corporation may be ascertained, decreed and determined; that this Honorable Court will fully administer the fund in which the complainant and all other stockholders, bondholders, noteholders and creditors are interested constituting all the property and assets of the defendant in accordance with the rights, equities, liens and priorities, if any, existing thereon and will enforce and decree the rights, equities, liens and priorities of the creditors, bondholders, noteholders and stockholders of the defendant as the same may finally be ascertained and decreed by this Court.

2. That this Honorable Court appoint forthwith a receiver or receivers of all and singular the property of the defendant corporation, of whatsoever nature, with full power to take into his or their possession, hold and manage the same under the direction of this Court, with such powers as this Court may from time to time grant in its discretion, to bring suit for, collect, receive and take into his or their possession all the property and assets of defendant corporation, including its books, records, vouchers, checks, moneys, real estate and all other property, real, personal and mixed; to institute, prosecute, become parties to, intervene in, compromise or defend any actions at law or in equity, or under any statute for the recovery, protection

and maintenance of any of the assets or properties of defendant corporation, as he or they may deem proper or necessary, including the institution and prosecution of any such ancillary proceedings as he or they deem advisable; to [fol. 200] settle, compound, adjust or make allowances upon any debts that may be due or owing to the defendant corporation as he or they may deem proper; to pay any such claims or wages as may have priority, and in general, with all the usual powers of receivers in such cases.

3. That the officers, managers, employees, creditors, stockholders, bondholders, and noteholders of the defendant corporation, and all other persons, firms and corporations be forthwith required to transfer, convey and deliver up to such receiver or receivers possession of all property of the defendant corporation wheresoever situated.

4. That all persons, firms and corporations be enjoined forthwith from instituting, commencing, prosecuting or continuing the prosecution of any actions, suits or proceedings at law or in equity, or under any statute, against defendant corporation, from levying or serving any attachments or executions or other processes upon the defendant corporation save and except the filing of mechanics' or other statutory liens, and generally that all persons, firms and corporations be enjoined from doing any act to interfere with said receivers in their possession of the property of the defendant corporation.

5. That your complainant may have such other and further relief as may be just or proper.

Patterson, Sherrard & Miller, Solicitors for Complainant.

Certified from the records this 22nd day of March, 1932,
J. Wood Clark, Clerk.

[fol. 201] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity

FRANK T. HARRINGTON, Complainant,

vs.

DUQUESNE GAS CORPORATION, Defendant

DEFENDANT'S ANSWER TO AMENDED BILL OF COMPLAINT, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

Duquesne Gas Corporation, the defendant, answers as follows the averments of the amended bill of complaint:

1. Defendant admits the averments of paragraph 1.

2. Defendant admits that complainant is the owner of 100 shares of defendant's common stock without nominal or par value. Defendant avers that complainant became the holder of record of said shares on the 21st day of September, 1931 except for the complainant's own averment that defendant has no knowledge, information, or source of information as to the date when complainant became the actual as distinguished from the record owner of said shares.

3. Answering the averments of paragraph 3, defendant denies that it was organized under any statute of Penn- [fol. 202] sylvania especially applicable to public utility corporations, and avers that it was organized and now exists under and by virtue of the General Corporation Act of 1874, its amendments and supplements. Defendant avers that its business is the sale of gas to large industrial and public utility consumers under special contracts in each case, and that it does not itself sell any gas to domestic consumers. Defendant admits that Victor Gas Company, a subsidiary of the defendant, sells gas to domestic consumers, but avers that the domestic consumers to whom said Victor Gas Company sells gas do not exceed and never have exceeded the number of six. Said Victor Gas Company is a public utility corporation under the laws of Pennsylvania and is subject to regulation and control as such by the Public Service Commission of Pennsylvania. Defendant avers that a proceeding is

now in progress before said Public Service Commission at Docket No. 8879 for the purpose, inter alia, of ascertaining and determining whether or not the defendant is a public utility corporation. The defendant neither admits nor denies that it is a public utility corporation, but submits the complainant's averment in that behalf to adjudication by this Court.

4. Defendant admits the averments of paragraph 4.

5. Defendant admits the averments of paragraph 5 except that defendant denies that it owns natural gas properties in West Virginia, directly or indirectly. Defendant avers that its natural gas properties in West Virginia, [fol. 203] whether held directly or indirectly through subsidiaries, are not owned in fee, but are held under lease.

6. Defendant admits the averments of paragraph 6, the said admission as to domestic consumers, however, being qualified by the averments of paragraph 3 hereof.

7. Defendant admits the averments of paragraph 7.

8. (a) Defendant admits the issuance of $4,000,000 par value of First Mortgage 6% Convertible Gold Bonds of the description alleged by complainant, that $3,965,000 thereof are outstanding, and that the interest due thereon September 15, 1931, under the terms thereof has not been paid. Defendant denies that the said bonds will mature September 15, 1945, and avers that the same are now due under the terms thereof by virtue of acceleration of maturity due to declaration of default. Defendant neither admits nor denies that it is liable on the said bonds but leaves that issue to an adjudication, hereby referring to defendant's answer in a suit in this Court entitled "Central Hanover Bank & Trust Company, as trustee under First Mortgage of Duquesne Gas Corporation dated March 15, 1930, Plaintiff, against Duquesne Gas Corporation, Defendant, No. 2577, In Equity". A copy of said answer is hereto annexed, marked Exhibit 1 and made part hereof.

(b) Defendant admits that there are now issued and outstanding $949,000 par value of Convertible 6½% Secured [fol. 204] Gold Notes of the description alleged by complainant. Defendant neither admits nor denies that it is liable thereon, but leaves that issue for adjudication by this

Court, hereby averring that the defendant's incorporation and right to do business were not submitted to or approved by the Public Service Commission of Pennsylvania, that no certificate of notification was filed with said body on the issuance of said notes, and that no action was had or taken by said commission in that behalf; and the defendant hereby refers to the averments of said Exhibit 1 in respect of the proceeding before said Commission now pending at its Docket No. 8879. Defendant admits that the interest due September 15, 1931 under the terms of said notes has not been paid.

9. Defendant admits the averments of paragraph 9.

10. Defendant denies that it is or has been doing business at a loss even without paying or providing for the interest on said bonds and notes, and avers that it is and has been doing business at a loss if the said interest be charged but at a profit if said interest be not charged; and defendant avers on information and belief that if no charge or deduction were to be made for said interest, defendant's operations would be at a profit. Defendant admits that, said interest being charged or deducted, it cannot continue to operate otherwise than at a loss unless there be a complete reorganization of the defendant in respect of its capital structure.

11. Answering paragraph 11, defendant denies that it is unable to continue to carry on its business without the ap- [fol. 205] pointment of a receiver who can borrow funds for that purpose, and avers that the defendant now has sufficient cash resources to carry on its business and pay its current expenses. Defendant admits, however, that it cannot without greater working capital than it now has, continue to operate its business and pay, in addition to current expenses, interest upon the above mentioned bonds and notes. Defendant further admits that it cannot permanently carry on its business without reorganization and substantial changes in its capital structure. Defendant denies the complainant's averment that the defendant is presently unable to meet its due and maturing obligations, and avers that it is able to meet such obligations except the said bonds and notes and interest thereon. Defendant denies that there are any pending suits or attachments by creditors whereby the defendant's properties will be dissipated, wasted and

sacrificed, but admits that a suit has been commenced in this Court at No. 2577 in Equity, as aforesaid, for the principal purpose of foreclosure on said $3,965,000, face amount of First Mortgage 6% Convertible Gold Bonds. Defendant further admits that the rights, liens, priorities and securities of the holders of the defendant's said outstanding bonds, notes and stocks should be ascertained, determined, adjudicated and declared by this Court. Defendant further admits that in the opinion of the defendant this cannot be done, or the rights of all parties in interest be fairly and justly determined, or a reorganization of the defendant be effected without the interposition of this Court and the appointment of a general receiver of all the defendant's [fol. 206] properties and franchises.

12-16. Answering the averments of 12-16, both inclusive, defendant admits that said Ralph E. Davis appraised a portion of the properties now held by the defendant and that said Mattison, Davey & Winters appraised a portion thereof and that the appraisal by said Davis showed a value of the property appraised by him of $1,743,520. As to complainant's averment that the appraisal of the remainder of the properties by Mattison, Davey & Winters showed a valuation of $4,929,787, defendant avers that the aggregate of the two appraisements was $6,929,501, but that the total valuation used by the defendant's board of directors in connection with the issuance of securities was $6,673,307. Defendant did not itself employ either said Ralph E. Davis or said Mattison, Davey & Winters, and does not know what may have passed between Furlaud Reuter & Company and said Ralph E. Davis as to the figure at which said Ralph E. Davis would have appraised the portion of defendant's properties subsequently appraised by Mattison, Davey & Winters, and does not know whether said last mentioned firm did or did not give notice to said Davis or consult with said Davis before making its appraisal. Defendant denies on information and belief that the present value of the properties now held by defendant is $3,200,000, and avers on information and belief that the present value of said properties does not exceed approximately $2,200,000. Defendant does not know and is not informed at what figure

[fol. 207] or figures said Furlaud, Reuter & Company or any other person, may have disposed of the defendant's securities to the public.

17. Answering the averments of paragraph 17, defendant admits that a suit has been commenced as hereinbefore stated for the foreclosure of the above mentioned First Mortgage Bonds, and, on information and belief, that suit was brought at the instance of a Bondholders' Protective Committee other than that of which complainant is a member; but defendant avers that it is without knowledge as to the other matters alleged by complainant in said paragraph.

18. Defendant has no knowledge or information as to whether the suit described by the complainant in paragraph 18 is under contemplation or by whom as plaintiffs, or any knowledge or information in regard to any such suit other than the complainant's averments in that behalf. Otherwise, the defendant is unable to answer the averments of paragraph 18.

19. Defendant admits that said Bondholders' Protective Committee has been permitted to intervene in said proceeding now pending before the Public Service Commission of Pennsylvania. As to whether said Bondholders' Protective Committee is co-operating with said Commission or to what extent, the defendant has no knowledge or information.

20. Defendant admits the averments of paragraph 20.

[fol. 208] And for further answer, defendant avers:

21. Reference is made to said suit of foreclosure at No. 2577 in Equity, and particularly to this defendant's answer therein, being Exhibit 1 hereto attached, from which it appears that a substantial question is raised as to the validity of said $3,965,000 of First Mortgage Bonds now outstanding, and particularly as to the validity of $1,300,000 thereof. In case said First Mortgage Bonds, or any portion thereof, shall be held invalid and securities heretofore issued by the defendant subsequent in lien or security to said First Mortgage Bonds held valid, said First Mortgage Bonds or such invalid portion thereof, either would not be paid

or would be subsequent in lien and security to other securities of the defendant by their terms subsequent in lien and security to said First Mortgage Bonds. So that there is inherent in the present situation a conflict, or potential conflict, in interest, between the holders or some of the holders, of the First Mortgage Bonds and the holders of securities by their terms subsequent thereto.

22. The complainant herein avers that he is a stockholder, but in paragraph 17 of said amended bill of complaint he avers further that he is a member of a Bondholder's Protective Committee. Defendant avers on information and belief that the said committee is a committee formed in the interest of the holders of First Mortgage Bonds and that the primary interest of the complainant herein is in respect of the First Mortgage Bonds. Defendant further avers on information and belief that the complainant and the said committee of which he is a member [fol. 209] are acting in association and co-operation with divers investment banking and brokerage houses by which the defendant's First Mortgage Bonds were marketed, although certain of said houses may have marketed, in addition to said First Mortgage Bonds, other securities of the defendant.

23. In said amended bill of complaint, particularly in paragraph- 13 to 16 thereof, it is charged that Furlaud Reuter & Company, an investment banking house, has committed fraud upon defendant in connection with certain of the defendant's securities and is bound to make restitution.

24. Defendant avers on information and belief that said foreclosure suit at No. 2577 in Equity has been brought pursuant to demand made upon the trustee by a Bondholders' Protective Committee for holders of First Mortgage Bonds other than the Bondholders' Protective Committee of which the complainant is a member, and that said committee consists of persons connected with investment banking houses by which defendant's First Mortgage Bonds were marketed.

25. In view of the facts averred in paragraphs 22, 23 and 24 hereof, it appears that both complainants now seeking the appointment of a receiver for the defendant, to-wit,

Central Hanover Bank & Trust Company as trustee at No. 2577 in Equity and the complainant in this suit, and the persons at whose instance the said complainants are acting in seeking the appointment of a receiver, are primarily interested in establishing the validity, priority, and lien of the defendant's First Mortgage Bonds as distinguished from any other class or classes of defendant's securities, [fol. 210] whereas, as defendant submits, the ultimate solution of the defendant's present difficulties must be worked out through a general receivership, a full and impartial investigation of all the circumstances under which the defendant's securities were issued and distributed to the public, and an adjudication of the rights, liens, and priorities of all classes of security holders and creditors.

Wherefore, the defendant prays:

1. That the rights of all creditors of the defendant and of the holders of the defendant's First Mortgage Bonds, secured notes, and stock may be ascertained, decreed, and determined; that this Court will fully administer the fund in which the defendant's creditors and holders of the defendant's securities are interested, constituting all the property and assets of the defendant, in accordance with the rights, equities, liens and priorities of the creditors and stockholders of the defendant as the same finally may be ascertained and decreed by this Court.

2. That this Court, for the purpose of granting the relief prayed for herein and to protect the rights and interests of all the stockholders and creditors of the defendant, take over unto itself the jurisdiction and control of all the assets and property of the defendant of every kind and description whatsoever, and that, pending this suit, it grant such specific relief as from time to time may be expedient and appropriate to maintain such jurisdiction and control.

3. That for the purpose of preserving the unity and integrity of the property and assets of the defendant and of [fol. 211] preventing disruption thereof by any separate executions, attachments, or levies that may be attempted during the pendency of this suit, a receiver or receivers be appointed of the defendant and all of its property and assets, real, personal, and mixed, of whatsoever kind and description and wheresoever situate, and all the tolls, earn-

ings, rents, issues, profits, revenues, and income thereof, with the usual powers of general receivers and with full power and authority to take possession of the properties, real and personal, premises, easements, franchises, leases, rights, privileges, and interests of the defendant of whatsoever kind and character, and to manage and operate the same and to continue the business of the defendant and to collect and receive the tolls, earnings, issues, rents, profits, revenues, and income thereof, and every part thereof, and to apply the same as this Court from time to time may order and decree; and that such further powers and authority as to this Court may seem meet and proper may be granted by it to any receiver or receivers so appointed.

4. That the properties and assets and business of the defendant may be ordered to be sold as an entirety, with such exceptions and in such manner and upon such terms and conditions as this Court shall deem just and equitable, and that any such order shall make proper and suitable provisions for the protection of all just and lawful equities, rights, priorities, claims, and liens of the creditors of the defendant and shall provide for the sale of the property, assets, and business of the defendant, subject to or free and clear from any and all liens and incumbrances, and [fol. 212] that the proceeds of any such sale may be distributed by and under the direction of this Court among the creditors of the defendant adjudicated by the Court to have interests therein and such others, if any, as this Court may adjudicate to be entitled thereto.

5. That pending this suit an injunction may issue out of and under the seal of this Court enjoining and restraining all persons, including creditors of the defendant, from levying executions upon, attaching, or intermeddling with or taking possession of any of the property or assets of the defendant.

6. That the Court will make such other and further decrees and orders from time to time as may be just, meet and proper for the administration of the defendant's property and assets by the Court by its receiver or receivers and to ascertain, determine, adjudicate, protect and assure the rights of creditors of the defendant and any and all

other persons having any interest, legal or equitable, in or to the property and assets of the defendant.

Duquesne Gas Corporation, by Charles C. Nuss, President. Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for the Defendant. Hause, Evans & Baker, Harrisburg, Pennsylvania, of Counsel.

(Verified by Charles C. Nuss, President, Jan. 15, 1932.)

[fol. 213] CERTIFIED COPY OF RESOLUTION OF BOARD OF DIRECTORS OF DUQUESNE GAS CORPORATION, ANNEXED TO ANSWER IN HARRINGTON v. DUQUESNE GAS CORPORATION

Whereas, in the District Court of the United States for the Western District of Pennsylvania, at No. 2554 in Equity, Frank T. Harrington, as complainant, has filed suit against this corporation for a receiver and for relief as prayed for in his bill of complaint, an answer having been filed thereto by C. C. Nuss, President of the corporation; and

Whereas, on January 12, 1932 an amended bill of complaint was filed by the complainant in said cause, to which no answer on the part of this corporation has as yet been filed; and

Whereas in the said Court at No. 2577 in Equity, Central Hanover Bank & Trust Company, as trustee under the First Mortgage Indenture, has filed bill of complaint for foreclosure and other relief to which answer has been filed by this corporation through the agency of C. C. Nuss as President; and

Whereas in connection with said last mentioned proceeding, formal application has been made to the Court for the appointment of a receiver; and

Whereas the said suits and the status of the company with respect to its outstanding securities present a very complicated situation on which it is necessary for the President of the company to keep in close touch with counsel and [fol. 214] possibly to take such action as his judgment may commend without previous authorization of this board as to each specific action proposed to be taken by the corporation;

Resolved, that C. C. Nuss, the President of this corporation, be, and hereby is, authorized and empowered after

consultation with counsel, to take such action on behalf of this corporation as his judgment may commend in connection with either of the before mentioned suits or any other suits entered by or against this corporation arising in connection with its outstanding securities or any of the same or its obligations with respect thereto.

Resolved, further, that C. C. Nuss, the President of this corporation, be, and hereby is, authorized in his discretion, and on behalf of this corporation, to consent to the appointment of a receiver for this corporation in either of the above mentioned suits or any other suit; provided that the said C. C. Nuss shall first consult with counsel in regard thereto.

[fol. 215] State of Pennsylvania,
County of Alleghany, ss:

I, Harry J. Steele, Secretary of Duquesne Gas Corporation, hereby certify that the foregoing is a true and correct copy of preambles and resolutions adopted by the Board of Directors of this corporation at a meeting duly held on January 15, 1932.

Harry J. Steele, Secretary. (Corp. Seal.)

Sworn to and subscribed before me this 15th day of January, A. D. 1932. Fern F. Mesing, Notary Public. (Notarial Seal.)

Certified from the record this 22nd day of March, 1932.
J. Wood Clark, Clerk.

[fol. 216] Exhibit I, Annexed to Answer of Duquesne Gas Corporation

In the District Court of the United States for the Western District of Pennsylvania

In Equity. No. 2577

Central Hanover Bank & Trust Company, as Trustee under First Mortgage of Duquesne Gas Corporation dated March 15, 1930, Plaintiff,

against

Duquesne Gas Corporation, Defendant

Duquesne Gas Corporation, the defendant herein, admits the averments of the Bill of Complaint made in paragraphs

First to Fifteenth (both inclusive) thereof, except it does not admit (1) that it, the said defendant, is a corporation duly organized and existing under the laws of Pennsylvania, or (2) that all said $3,965,000.00 of First Mortgage Bonds now outstanding are in the hands of bona fide holders thereof for value, or (3) that all said $3,965,000.00 of bonds now outstanding, and particularly $1,300,000.00 par value thereof, are the lawfully issued, valid, and binding obligations of the defendant, or (4) that the said mortgage creates and establishes the first lien it purports to create and establish; but the defendant leaves the said not admitted mat-
[fol. 217] ters for determination and adjudication upon the facts hereinafter stated:

Sixteenth: The defendant corporation was organized and created under the Act of Assembly of the Commonwealth of Pennsylvania of April 29, 1874, P. L. 73, and its amendments and supplements, with charter powers as follows:

"Said corporation is formed for the purpose of mining, drilling, boring for and producing petroleum, oil, natural gas and other minerals and substances, incidentally developed, and the manufacturing, buying, selling, trading and dealing in the products and by-products thereof; the acquiring and holding of such lands, leases, mining and drilling rights, and the construction, erection and operation of such lines, pipe lines, buildings, machinery and appliances as may be necessary and convenient therefor and the transaction of all such business as is necessary and incidental thereto."

Seventeenth: At the time of organization and issuance of its securities, including the said First Mortgage Bonds, the defendant was advised by counsel that it was not a public service company or subject to the Public Service Company Law of Pennsylvania (Act of July 26, 1913, P. L. 1374); accordingly, the defendant did not seek or obtain the approval of said Public Service Commission to be incorporated, organized, or created, or to begin the exercise of any right, power, franchise or privilege and did not on or
[fol. 218] prior to the date it issued its securities, including said First Mortgage Bonds, file with said Commission its certificates of notification covering the issuance of said securities, or with respect to either of said matters, take any proceeding before said Commission.

Eighteenth: On April 28, 1931, the said Public Service Commission, purporting to act under said Public Service Company Law, issued its order at Complaint Docket No. 8879 against this defendant as follows:

"That an inquiry and investigation upon the Commission's own motion be and is hereby instituted into the status of the Duquesne Gas Corporation, and its failure to comply with the provisions of the laws of the Commonwealth applicable to public service companies; said inquiry to be scheduled for hearing and/or argument if desired not less than fifteen (15) days from the date of service hereof upon notice."

Said order was duly served upon the defendant, and a certified copy thereof is attached hereto, marked Exhibit "A", and made part hereof.

On September 1, 1931, said Commission, at the same docket number, issued a further order against defendant as follows:

"That the inquiry and investigation heretofore instituted by the Commission on its own motion under date of April 28, 1931, be and is hereby extended to include an inquiry [fol. 219] and investigation into the promotion, organization, financing and acquisition of the properties of the Duquesne Gas Corporation, and its failure to comply with the provisions of the laws of the Commonwealth applicable to public service companies."

Said further order was duly served on this defendant, and a certified copy thereof is hereto attached, marked Exhibit "B", and made part hereof.

On November 24, 1931, at the same docket number, a further order was made in said proceeding as follows:

"That S. P. Woodward, Frank T. Harrington, C. E. Wheeler and V. Blake Allison, constituting a Bondholders' Protective Committee of Duquesne Gas Corporation be and are hereby permitted to intervene in said complaint."

Said last mentioned order was duly served on this defendant, and the same is annexed hereto, marked Exhibit "C", and made part hereof.

Nineteenth: Said Commission has not as yet terminated said proceeding at its Docket No. 8879 or made any deter-

mination as to the sufficiency of this defendant's organization as a corporation or as to the validity of any of this defendant's outstanding securities or of the issuance thereof, but the said proceeding at Docket No. 8879 is still pending before said Commission and undetermined.

[fol. 220] The defendant avers the following facts in respect of, particularly, the above mentioned $1,300,000 par value of said First Mortgage Bonds:

Twentieth: The defendant corporation was organized on or about February 13, 1930 with authorized capital stock of 1,000 shares without nominal or par value having a stated capital of $500.00, which latter amount was paid in cash. On March 5, 1930, the defendant's organization meeting having been held February 21, 1930, the Board of Directors of the defendant authorized an increase of capital stock from 1,000 shares as aforesaid to 1,250,000 shares without nominal or par value having a stated capital of $625,000.00 and also authorized an increase of indebtedness from nothing to $10,000,000.00, and called a special meeting of stockholders for April 3, 1930, for the purpose, inter alia, of considering and acting upon the said increases of capital stock and indebtedness.

Twenty-first: Said meeting of stockholders was held on said appointed day, April 3, 1930, and said increases of capital stock and indebtedness were authorized and approved by the stockholders; the stockholders waived pre-emptive rights on the new stock so authorized; an amendment to the by-laws was approved providing that the stockholders should not have pre-emptive rights on new stock; the directors were authorized to issue stock up to 1,250,000 shares for such consideration as they should approve; the directors were authorized to accept an offer of Furlaud & Company, Inc., a New York corporation, to buy 139,000 shares of the just authorized stock for fifty cents per share, [fol. 221] or $69,500.00; engineers' and accountants' reports were submitted on the properties intended to be acquired by the company; the indenture under which said First Mortgage Bonds were issued was approved; a General Mortgage Indenture was approved under which $1,000,000.00 of General Mortgage 6½% Gold Bonds might be issued; and an agreement was approved under which Secured Gold Notes might be issued to the amount of $1,000,000.00 secured by $1,000,000.00 of said General Mortgage 6½% Gold Bonds.

Twenty-second: On April 7, 1930, a special meeting of the Board of Directors of the defendant corporation was held at which the following business was transacted: (1) Said offer of Furlaud & Company, Inc. to buy 139,000 shares of stock for $69,500.00 was accepted; (2) execution and delivery of the above mentioned indentures and agreement were authorized; (3) 400,000 shares of stock were set apart to meet the conversion requirements of the First Mortgage Bonds and Secured Notes; (4) a proposed agreement between Kingston Corporation (a New Jersey corporation) and the defendant was authorized and approved under which the defendant was to acquire its properties, the substance of said agreement being as follows:

(a) Kingston Corporation to transfer the said properties to the defendant corporation;

(b) The defendant corporation to pay the Kingston Corporation therefor by discharging $3,015,000.00 of indebted-
[fol. 222] ness owing by Kingston Corporation to Central Hanover Bank & Trust Company, the complainant herein, and by delivering to said Kingston Corporation $1,300,-000.00 par value of this defendant's First Mortgage Bonds and 535,000 shares of this defendant's stock:

(5) an offer of said Furlaud & Company, Inc. to buy $2,-700,000 par value of said First Mortgage Bonds at $900.00 and accrued interest per bond and $1,000,000.00 par value of said Secured Notes at $880.00 and accrued interest per note was accepted.

Twenty-third: Shortly after the said meeting the Kingston Corporation transferred said properties to the defendant corporation and the defendant corporation paid therefor as agreed; and said $2,700,000.00 of First Mortgage Bonds were delivered to Furlaud & Company, Inc. for $900.00 per Bond in cash and $1,000,000.00 of said Secured Notes were delivered to said Furlaud & Company, Inc. for $880.00 per note in cash, with accrued interest in each case.

Twenty-fourth: The defendant avers on information and belief that said Kingston Corporation was a subsidiary of said Furlaud & Company, Inc. and in said transaction was subject to the control of and in fact was controlled by said Furlaud & Company, Inc. Defendant further alleges, also upon information and belief, that the said properties trans-

ferred to the defendant corporation for, in effect, $3,015,000.00 in cash, $1,300,000.00 of First Mortgage Bonds, and [fol. 223] 535,000 shares of stock had cost the said Kingston Corporation, for the properties and all expenses in connection with the acquirement thereof, only $3,015,000.00.

Twenty-fifth: Defendant alleges on information and belief that at the time and times of all the directors' and stockholders' meetings hereinbefore referred to, said Furlaud & Company, Inc. owned all the stock of the defendant then outstanding except directors' qualifying shares, and the defendant's directors were the nominees of and were under the control of and in fact were controlled by said Furlaud & Company, Inc., and said Furlaud & Company, Inc. was the promoter of the defendant corporation and its organization and of the sale of the defendant's First Mortgage Bonds and other securities.

Twenty-sixth: On April 7, 1930, subsequent to the meeting of the Board of Directors of the defendant corporation above referred to and held on the same day, the then directors of the defendant corporation, three in number, resigned, and the number of the Board of Directors of the defendant was increased to six, and six new directors, and also a new President and a new treasurer, were elected.

Twenty-seventh: When the said transaction between the defendant corporation and Kingston Corporation was authorized and approved as above stated, the stockholders and directors of the defendant had before them reports of engineers of high standing showing the gas reserves and [fol. 224] plant and equipment to have a value of $6,923,501.00 based upon a certain program of development; but in said reports the gas reserves of non-operating properties held merely under lease were included in the valuation on a gas reserve basis, whereas, for the issuance of bonds thereon which was made subsequent to said reports, the said non-operating properties, as defendant alleges on information and belief, should have been placed on a value-of-acreage basis. The defendant avers on information and belief that on a value-of-acreage basis for non-operating properties held under lease the properties acquired by the defendant corporation from Kingston Corporation did not have a value in excess of $3,015,000.00, which was the

amount, or the approximate amount including expenses, paid therefor by said Kingston Corporation.

Twenty-eighth: In view of the facts hereinabove stated, the defendant does not know, and therefore leaves to judicial determination, whether said $1,300,000.00 of First Mortgage Bonds delivered to Kingston Corporation in connection with the acquirement of the defendant's properties did or did not constitute a fictitious issue of securities for which the issuer received no value.

Twenty-ninth: Defendant does not know who are the persons now holding said $1,300,000.00 of bonds delivered to said Kingston Corporation, or whether the holders thereof acquired the same for value or with or without notice of the matters hereinbefore averred, or whether said $1,300,000.00 of bonds are valid obligations of the defend-
[fol. 225] ant corporation or entitled to the lien and security of the said First Mortgage Indenture.

Duquesne Gas Corporation, by C. C. Nuss. President.
Maynard Teall, Reed, Smith, Shaw & McClay, Solicitors for Defendant. Hause, Evans & Baker, Harrisburg, Pennsylvania, of Counsel.

(Verified by C. C. Nuss on December 7, 1931.)

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity

FRANK T. HARRINGTON, Plaintiff,

vs.

DUQUESNE GAS CORPORATION, Defendant

PER CURIAM DECREE, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

And now, to-wit, January 19, 1932, the above cause came on for further hearing upon the bill of complaint as amended and the answer of the respondent as amended, [fol. 226] and it appearing to this Court that another action, brought by the Central Hanover Bank and Trust

Company as Trustee under the first mortgage of the Duquesne Gas Corporation dated as of March 15, 1930, against said Duquesne Gas Corporation at No. 2577 in Equity, seeks the foreclosure of the said first mortgage on the properties of the above named defendant, and that a complaint and answer have been filed therein, and the plaintiff in this action, No. 2554 in Equity, appearing by his solicitor, Clark Miller, Esq., and the defendant, by its solicitor, Maynard Teall, Esq., and the plaintiff in the proceeding at No. 2577 in Equity appearing by its counsel, Frank B. Ingersoll, Esq., and the defendant in said action by its counsel, Maynard Teall, Esq., and all of said counsel consenting to the entry of this order and the Court being fully advised of the premises, it is now

Ordered, adjudged and decreed:

1. That George W. McCandless, of the City of Pittsburgh, Pennsylvania, be and he is hereby appointed receiver of all and singular the assets, lands, tenements and hereditaments of the defendant, the Duquesne Gas Corporation, and all of its property, real, personal and mixed, of every nature and kind whatsoever, including all pipe lines, machinery, appliances, fittings and equipment belonging to or connected therewith, and all oil and gas rights, leases and leaseholds and the wells, derricks, drain pipes, casing, tubing, machinery and appliances and equipment thereon, connected therewith or belonging thereto, and all leases, contracts, stocks, bonds, obligations, choses in action, ac- [fol. 227] counts and rights owned by, belonging to or due to the defendant company, and all rights, franchises, income and profits granted to, acquired by or belonging to the defendant company.

2. That said receiver shall, before entering upon his duties hereunder, give and file with the Court a bond in the penal sum of $50,000 with surety or sureties approved by this Court, and conditioned that he will faithfully perform his duty as receiver herein and in any ancillary proceedings wherein he may be appointed, and will well and truly account for any and all moneys or property coming into his hands as such receiver, in accordance with the provisions of this order or any other order which may from time to time be issued by this Court, and abide by and perform all things which he is herein or may hereafter be directed to

perform in this cause or in any ancillary proceedings wherein he is appointed.

3. Upon the filing and approval of the said bond, said receiver be and he is hereby authorized, empowered and directed to take immediate possession of all and singular the assets above described or referred to, wherever the same may be situate or found, and until a further order of this Court to continue the operation of the business of the defendant company and every part or portion thereof and to run, manage and conduct such business under leases, contracts or arrangements as heretofore run, managed, conducted and operated by the defendant company, but the Court expressly reserves to itself the right to pass upon, disapprove, disavow and cancel any and all leases, arrangements and contracts of every nature, kind and description [fol. 228] under or by virtue of which the defendant company has been or is now operating any of its property.

The receiver shall exercise all such powers as are usually exercised by receivers and all such as are necessary, useful or convenient to the proper conduct by him of the business of the corporation, and he shall discharge all such duties as are within the line, scope and purpose of his appointment, including full power and authority to demand, sue for, collect, receive and take into possession the goods, chattels, rights, credits, moneys, effects, books and property of every description belonging to said defendant, Duquesne Gas Corporation, and including power to do any and all other acts which may be necessary to preserve the rights and properties of said defendant, Duquesne Gas Corporation. The receiver shall also exercise such further powers as the Court may from time to time grant.

4. That the defendant corporation and each and every of its officers, directors, agents and employees and all other persons, associations and corporations are now and hereby ordered, commanded and directed to turn over and deliver to such receiver, or his duly constituted representatives, any and all of the books of account, records, vouchers, checks, deeds, leases, contracts, agreements, notes, accounts, moneys, stocks, bonds, obligations and property of every kind and nature, real, personal and mixed, now in or which may hereafter come into his or their hands, control or possession.

That the defendant corporation and each and every of [fol. 229] its said officers, directors, agents and employees and all other persons, associations and corporations be and they are now and hereby restrained and enjoined during the pendency of this cause and the administration of the said receiver from transferring, selling, disposing of, or interfering with any of the property of the defendant corporation and from taking possession of or in any way interfering with the same or any part thereof, and from disturbing, preventing, or in any way interfering with the receiver in his possession, control, operation or management of the property, or any part thereof, of the defendant company over which the said receiver is hereby appointed as such; and from instituting, commencing, prosecuting or continuing the prosecution of, except as herein provided, any actions, suits or proceedings at law or in equity against the defendant corporation, from levying or serving any attachments or executions or other processes upon the defendant corporation save and except the filing of mechanics' or other statutory liens and save also as herein provided; and from disturbing, preventing or in any way interfering with the receiver in the discharge of his duties hereunder.

5. As soon as may be after the entry of this order, the receiver shall segregate and sequester for the benefit of the Trustee, plaintiff, at No. 2577 in Equity, and the holders of the first mortgage bonds of the defendant and appurtenant coupons secured by the first mortgage, all income, rents, issues and profits from the property, subject to the lien of the first mortgage, and apply the same to and for their benefit, subject only to such expenses and other uses as may be legally and properly incurred in the operation [fol. 230] and preservation of said property, having due regard to the rights of the said bondholders and the Trustee, plaintiff, at No. 2557 in Equity, and to the protection of the security of the first mortgage.

The receiver, as soon as practical and convenient, shall cause to be prepared a schedule of all and singular the property of the defendant, subject to the lien of the first mortgage, which may come into his possession as such receiver, and shall file the same with the Clerk of this Court, and he is directed to keep separate accounts of his transactions as such receiver and of such moneys and other property and assets which may from time to time come into

his hands as such receiver, and of the rents, issues, and profits of the property and assets, subject to the lien of the first mortgage, and to make report thereof from time to time as this Court may direct, but said schedule, account and/or reports shall not be conclusive on the Trustee, plaintiff, in the action at No. 2577 in Equity, it being further provided that said segregation and sequestration and separate accounting shall be without prejudice to any rights of the parties in said action at No. 2577 in Equity and shall not be taken as any adjudication of the rights of the first mortgage bondholders or any other class of security holders.

6. This action and that at No. 2577 in Equity, in which the Central Hanover Bank and Trust Company, as Trustee, is plaintiff, and the Duquesne Gas Corporation is defendant, be and the same are hereby consolidated and that action and all the proceedings therein shall hereafter be brought and docketed under the title, number and term of [fol. 231] this action, said consolidation being made without prejudice to the rights of the parties as accrued under the pleadings heretofore filed in said action at No. 2577 in Equity.

7. The Court reserves the full right and jurisdiction from time to time to make such further orders or decrees amplifying, extending, limiting or otherwise modifying this order as to it may at any time seem proper and in all respects and at all times to regulate and control the conduct of the receiver.

Per Curiam. S.

Certified from the record this 22nd day of March, 1932.
J. Wood Clark, Clerk.

DISTRICT COURT OF THE UNITED STATES, WESTERN DISTRICT OF PENNSYLVANIA

No. 2554. In Equity

FRANK T. HARRINGTON, Complainant,

vs.

DUQUESNE GAS CORPORATION, Defendant

CERTIFICATE, ANNEXED TO PETITION OF GEORGE W. McCANDLESS

I, J. Wood Clark, Clerk of the United States District Court for the Western District of Pennsylvania do hereby [fol. 232] certify that bond in the sum of $50,000 filed by George W. McCandless, Receiver, was filed and approved by the Court on the 20th day of January, 1932.

Witness my hand and the seal of this Court this 22nd day of March, 1932.

J. Wood Clark, Clerk. (Seal of the United States District Court, Western District of Pennsylvania.)

IN UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

In Equity. No. 66-184

FRANK T. HARRINGTON, Complainant,

against

DUQUESNE GAS CORPORATION, Defendant

ORDER APPOINTING GEORGE W. McCANDLESS ANCILLARY RECEIVER

Upon the annexed bill of complaint filed in the above entitled suit in the United States District Court for the Western District of Pennsylvania, and upon the answer of the defendant therein to said amended bill of complaint, and upon the per curiam decree therein of the United [fol. 233] States District Court for the Western District of Pennsylvania, dated the 19th day of January, 1932, ap-

pointing George W. McCandless receiver of the assets, lands, tenements and hereditaments of the defendant Duquesne Gas Corporation, and all of its property real and personal, including choses in action, and upon the certificate of the Clerk of the United States District Court for the Western District of Pennsylvania of the filing and the approving of the bond of said receiver, and upon reading and filing the petition of said George W. McCandless, duly verified the 23 day of March, 1932 from which it appears to the satisfaction of the Court that there is need of an ancillary receivership in this district.

Now, on motion of Erich, Royall, Wheeler & Walter, solicitors for the petitioner, it is

Ordered, adjudged and decreed that George W. McCandless be and he hereby is appointed ancillary receiver of Duquesne Gas Corporation in and for the Southern District of New York to carry into force and effect the order of the Court of original jurisdiction, and it is further

Ordered, adjudged and decreed that said ancillary receiver is hereby authorized to bring an action against the promoters of said corporation, including Maxime H. Furlaud and Carlos Reuter, for an accounting and for the restition of funds fraudulently diverted and misappropriated and of secret and excessive profits; and to petition for an order to retain solicitors for that purpose; and to do any and all things necessary to be done in connection therewith; and it is further

[fols. 234-317] Ordered, adjudged and decreed that the defendant, its agents or employees, stockholders, creditors and all marshalls, sheriffs, constables and all other officers, and generally all persons, firms and corporations whatsoever, are hereby enjoined from interfering or attempting to interfere in any manner with said ancillary receiver in effecting such purposs, and it is further

Ordered, adjudged and decreed that before entering upon the performance of any of his duties the said ancillary receiver shall execute and file with the Clerk of this Court a bond with one or more sureties approved by this Court in the penal sum of Twenty-five thousand Dollars ($25,000) conditioned upon the faithful discharge of his duties, and that upon any moneys or funds coming into his hands said ancillary receiver shall immediately report the fact to the

Court and submit to the Court the question of an increase of this bond, and it is further

Ordered, adjudged and decreed that any corporate surety duly qualified in accordance with General Rule 28 of this Court shall be sufficient for this purpose, and it is further

Ordered, adjudged and decreed that said ancillary receiver shall make himself amenable to the jurisdiction of this Court and shall authorize his attorneys within this District to accept upon his behalf service of any process of the Federal and State Courts within this District and shall have leave to apply to this Court for further orders and authority and shall comply with all orders of the Court of original jurisdiction.

(Signed) Wm. Bondy, U. S. D. J.

March 23, 1932.

[fol. 318] In United States District Court

Opinion by Knox, D. J.

This is a suit in equity brought by complainant, as Receiver of Duquesne Gas Corporation, to compel defendants to account

"for all funds or moneys coming into the hands of them or any of them, or of the agents or representatives of any of them, or in the hands of anyone else acting with or for them, from the sale of the bonds, notes and shares of stock of said Duquesne Gas Corporation."

The special grievance of the bill is that defendants, or some of them, through the instrumentality of an alleged banking house, known as Furlaud & Co., Inc. came into possession of funds arising from the public offerings of securities of Duquesne Gas Corporation, in the relationship of fiduciaries to that company, and that a large portion of the funds so received, were diverted and misappropriated from the treasury of the gas corporation. The defendants named in the bill may be identified as follows:

Maxime H. Furlaud was the president and principal stockholder of Furlaud & Co. Inc. Carlos Reuter, also an officer and large stockholder in Furlaud & Co. Inc., although named as a defendant herein, was not served with

process. He is, therefore, out of the case. Kingston Corporation was a wholly owned subsidiary of Furlaud & Co. Inc. Byron Corporation was owned, in part, by the wife of Maxime H. Furlaud, and in part by the Kipling Corporation, the ownership of which was not revealed. Chaucer Corporation was owned partly by the wife of Carlos Reuter, and partly by Virgil Corporation, whose ownership likewise did not appear.

[fol. 319] The evidence discloses that Furlaud & Co. Inc., a New York Corporation, was engaged in the business of selling issues of corporate securities to the public. The series of events under inquiry had its beginning early in 1930 when Reuter went to Pittsburgh, and negotiated with the owners of nine different gas properties located in Western Pennsylvania, for the purchase of their holdings. He secured gratuitous options thereon, which were taken in the name of Kingston Corporation. Ralph E. Davis, an engineer familiar with the value of the properties, was engaged to make an appraisal of the same. Davis, together with a staff of assistants, entered upon the work. By February 1, 1930, he had rendered reports which indicated that five of the properties, including their working capital, had an aggregate value of around $1,700,000. They were subsequently acquired for about $1,300,000. At the time this appraisal was submitted, Davis had about completed his data relating to the four other tracts, and his preliminary figures, as laid before Reuter, showed their approximate value to be in the neighborhood of $1,000,000. At about this time, Reuter secured possession of Davis's working papers, and retained a Texas concern, by the name of Mattison, Davey & Winters, to complete the appraisal. A man named Conrad, who seems to have had no experience in the Pennsylvania gas fields, was delegated to do the work. After working single-handed for some ten days, Conrad fixed his valuation of the four remaining properties at about five million dollars. Certain of these gas lands which were later conveyed to Duquesne Gas Corporation for $660,000 by one Nuss, who had been born and raised in the field, and who was in the gas business, were valued by Conrad for [fol. 320] approximately $1,900,000. When Nuss made his conveyance, he included therein certain leases upon undeveloped lands which were regarded as a gift. Conrad gave these undeveloped properties a valuation of $850,000.

Other lands, known as the Behm properties, the Tucker acreage, and the Levier tract, which were acquired by the gas corporation for a total sum of $222,697, were valued at $1,300,000. From the recital, it will be observed that properties costing about $900,000, were appraised as being worth about $4,000,000. The total appraisal for all of the gas properties examined by Conrad was about $5,000,000 although their total cost was only around $1,200,000.

The valuation thus fixed having been reached near the middle of February, 1930, the bankers procured extensions of their options upon the lands and made payments to the several optioners, upon account of the purchase prices named in the agreements. The documents were enforcible at the election of the optionees.

About a week thereafter, and on February 21, 1930, Furlaud & Co. Inc. caused Duquesne Gas Corporation to be organized under the laws of the Commonwealth of Pennsylvania. This concern had an authorized capital of 1,000 shares of no par common stock. The stock was subscribed by nominees of Furlaud & Co. Inc. at fifty cents per share. The banking house then arranged with the several optioners of the gas properties for the execution of deeds of assignment thereon, and for the delivery of the latter and accompanying muniments of title in escrow, to various banks located in Pittsburgh and its vicinity.

Duquesne Gas Corporation was named as the assignee in the conveyances thus deposited. Under the terms of the [fol. 321] option agreements, the balance of the purchase price yet to be paid for the properties was $2,449,900, after taking into consideration various down payments which had previously been made by Kingston Corporation.

The next step in the plan under way was the action of Furlaud & Co. Inc. in bringing about the organization of a so-called "Banker's Syndicate," and a distributing group for the sale and distribution to the public of First Mortgage Six Percent Gold Bonds of Duquesne Gas Corporation, of the par value of four million dollars. The Syndicate was headed by Furlaud & Co., Inc. as managers; and included in its membership, were four other so-called banking houses. All were named in the public announcement of the bond issue which appeared in the New York Times of March 25, 1930. Some forty dealers in corporate securities, scattered over the length and breadth of the land, be-

came members of the distributing group. The bonds were offered at 97½ percent of par, and members of the distributing group were entitled to a commission of four percent of par.

At about the time this step was in progress, Duquesne Gas Corporation, the entire capital stock of which was held by Furland & Co. Inc. or its nominees, authorized issue of four million dollars of six percent gold bonds, and the one million dollars of 6½% percent notes, to be secured respectively by first and second mortgages upon its properties. The Company's authorized capital was also increased from 1,000 to 675,000 shares, without par value.

Circulars advertising the bonds now made their appearance. These instruments, as well as the announcement that appeared in the New York Times, proclaimed that the [fol. 322] bonds were secured by a mortgage covering properties which, including working capital of $365,000, had an aggregate appraised value of $7,038,000. It was also stated that the properties examined by Mattison, Davey and Winters, had been appraised at $4,929,787, while those examined by Ralph E. Davis, carried an appraisal of $1,743,520.

There was testimony at the trial that the circulars, as originally printed, combined the appraised values, and indicated that appraisal as having been jointly made by Davis and by Mattison, Davey and Winters. Upon the objection of Davis, this phraseology was changed so as to eliminate such a misrepresentation.

On April 7, 1930, Duquesne Gas Corporation and Kingston Corporation entered into what was termed an "Agreement of Reorganization". This instrument provided that Kingston Corporation would acquire the optioned gas properties then in escrow, and turn them over to Duquesne Gas Corporation. The latter, on its part, agreed to pay $3,015,000 to Central Hanover Bank & Trust Company, the amount which Kingston Corporation would be under obligation to pay to the Trust Company. The Duquesne Company further agreed to issue 535,000 shares of its stock and $1,300,000 face value of its first mortgage six percent gold bonds to Kingston Corporation, the bonds to be secured by an indenture, dated March 15, 1930, in which the Trust Company was named as Trustee. On April 9, 1930, the following transactions were had at the offices of Central Hanover Bank & Trust Company:

Maxime H. Furlaud arranged with the bank that for a period of one day the Kingston Corporation should have a credit of $3,015,000, and that Furlaud & Company, Inc. [fol. 323] for a like period of time, should be entitled to a credit of $3,379,500.

When these credits, which were both closely controlled by the Trust Company, had been set up, Kingston Corporation delivered its certified checks, in the aggregate amount of $2,449,900 to the Equitable Trust Company, Guaranty Trust Company of New York and Central Hanover Bank and Trust Company, respectively. These checks were intended to put the drawees in funds with which to meet drafts which had been drawn against them by the banks in Western Pennsylvania, which held in escrow the several instruments of conveyance by which the gas properties were to be transferred to Duquesne Gas Corporation.

The balance which now remained to the credit of Kingston Corporation upon the books of Central Hanover Bank and Trust Company—the sum of $565,100, was immediately paid back to Furlaud & Company, Inc.—$300,000 for alleged loans advanced and expenses incurred, and $265,100 in the form of a loan. This loan, it may be remarked, incidentally, has never been repaid.

The banking institutions which received the checks of Kingston Corporation having made telephonic and telegraphic reports of the payments of the purchase money drafts to the banks holding the escrowed conveyances, the latter were straightway delivered and recorded. This information, being received, Duquesne Gas Corporation proceeded to issue to Kingston Corporation the 535,000 shares of stock and $1,300,000 face value of bonds which were called for by the agreement of April 7, 1930. Thereupon, Furlaud & Company, Inc. delivered its check to Dequesne Gas Corporation in the sum of $3,379,500. This was sup- [fol. 324] posed to represent the proceeds which the gas corporation was to receive for $2,700,000 par value of its six percent bonds, its million dollar issue of gold notes, and 139,000 shares of its capital stock. All of these securities were contemporaneously delivered to Furlaud & Company, Inc. and with the credits which thus came into the treasury of Duquesne Gas Corporation, that Company drew its check for $3,015,000 to Central Hanover Bank and Trust Company in payment of the credit that the bank had advanced

to Kingston Corporation. Throughout the proceedings, representatives of the various security dealers who were to distribute the bonds to the public were waiting without the room in which the foregoing transactions were being consummated. They carried checks for the purchase price of the bonds which their firms had respectively undertaken to distribute. These checks total about $3,000,000 and they were immediately exchanged for about eighty percentum of the whole bond issue. When this had been accomplished, Furlaud & Company, Inc. out of the money so obtained, and with that which had come from Kingston Corporation, liquidated the credit which it had obtained from the Trust Company.

Within a few weeks from the date of closing, Furlaud & Company, Inc. disposed of the balance of the six percent bonds which had come into its hands. When it had done so, there had been a total realization from their distribution of $3,631,671.04. But this was not all. It was but a few weeks until Furlaud & Company, Inc. sold the million dollar issue of the Gas Company's 6½ percent notes to the firm of Cullen & Drew for $861,097.69.

[fol. 325] On June 4, 1930, Kingston Corporation recorded a transfer of bonds of Duquesne Gas Corporation in the face value of $1,300,000 to Furlaud & Company, Inc. by way of a dividend in kind. As a matter of fact, however, the bonds had previously been delivered to Furlaud & Company, Inc., and had been sold.

Finally, Kingston Corporation recorded the sale of 85,000 shares of stock of the gas corporation to the Byron Corporation and to the Chaucer Corporation at fifty cents per share. These concerns sold the same for $850,000.

The foregoing transactions may be summarized as follows:

Furlaud & Company, Inc. received $4,492,768.73 from the sale of the bonds and notes. It paid $2,572,989 to the vendors of the gas properties, and turned over $364,500 to Duquesne Gas Corporation. The latter had that sum plus the physical properties and the $500 it had received for its original issue of 1,000 shares of stock; and was obligated upon all of the securities that had been issued. Bryon and Chaucer Corporation were in pocket $850,000 and Furlaud & Company, Inc. still had possession of 590,-

000 shares of the gas corporation stock, as well as cash in the sum of $1,554,779.73.

Upon the proof before the court, there can be but little doubt that the circulars which Furlaud & Company, Inc. issued in connection with the sale and distribution of the bonds and notes of Duquesne Gas Corporation grossly and fraudulently misrepresented the value of the property by which they were secured. The circulars stated that

"the appraisals of the engineers covering the properties [fol. 326] of the corporation, including working capital of $363,000, aggregate $7,038,000."

The manner in which this excessive appraisal was secured has been related. It was accomplished through the simple expedient of displacing a competent and careful engineer with one who either did not know values, or who was willing to lend himself to the promotion of a bond jobbing operation. When, in addition to this procedure, consideration is given to the incontrovertible fact that the cost of the properties, plus $365,000, amounted only to $2,937,989, it is clearly apparent that the value of the properties as given to the public was wantonly misrepresented. Defendants, it may be remarked, offered no evidence to rebut the conclusion that is compelled by plaintiff's proof.

The circulars further stated that the bonds and notes of the gas company were

"issued by the corporation in connection with the acquisition of properties, and to provide cash for developments, extensions and other corporate purposes."

Defendants argue that this statement was true. In a strictly literal sense there is a modicum of justification for the argument. From the standpoint of fair dealing and honest conduct, the statement was utterly false. No stretch of a straight imagination can reconcile its content with the actualities of the situation. What purchasers of bonds and notes would have believed that out of the sum of $4,492,768.73 which they exchanged for the obligations of the company more than one and one half million dollars would [fol. 327] be appropriated by Furlaud & Company, Inc., and that but a trifle less than three million dollars would be devoted to the corporate purposes of the gas corporation?

That the wrong of a misrepresentation may consist of the quality of its concealment rather than in the nature of its revelation, was made abundantly clear by Lord Halsbury in his opinion in the case of Aaron's Reefs v. Twiss, L. R. (App. Cas. 1896), 273, 285, where he said:

"If by a number of statements you intentionally gave a false impression and induce a person to act upon it, it is not the less false although if one takes each statement by itself there may be a difficulty in showing that any specific statement is untrue."

This statement of Lord Halsbury was quoted with approval by the Court of Appeals of this State in Downey v. Finucane, 205 N. Y. 251, 264. In that litigation, as in this, the promoters of a corporation issued a prospectus for the purpose of inducing sales of the corporation's bonds. The circular contained an ambiguous declaration which was interpreted by the promoters to mean that the corporation was obligated to sell bonds in the amount of five million dollars, but that no one was obligated to purchase them. On the trial the jury found that, taking the prospectus as a whole, its language fairly conveyed the impression that contracts had been made which were mutually binding upon the parties thereto under which the corporation was assured of obtaining five million dollars. The Court of Ap- [fol. 328] peals sustained such finding, and held that a general reader would have been misled by the circular. It seems reasonably clear that in the case at bar the purchasers of the bonds and notes of the gas corporation must have been similarly misled. They were induced to part with their money upon a representation that their payments were to be devoted to the legitimate purposes of the obligor corporation, but they were not apprised that their funds should serve unjustly to enrich the company's promoters.

Had the transaction been characterized by forthright honesty, there would have been no need for the check kiting and other legerdemain that marked the flotation of Duquesne Gas Corporation's securities. All that would have been required had the gas corporation been an independent entity, and a free agency, was that Furlaud & Company, Inc. should have advanced the purchase money of the gas properties, together with a contribution of $364,500 to the company's working capital. In return for this, the cor-

poration could have issued its securities, and Furlaud & Company, Inc. could have done with them as it chose. In place of open and above board procedure, the Kingston Corporation was injected into the situation. This was done for the reason that Furlaud & Company, Inc. intended as it used one hand to pour $3,379,500 in to the treasury of the gas corporation, to siphon $565,100 from the treasury with the other. At the end of the complicated series of transactions occurring at the closing, Kingston Corporation was in precisely the same condition as it was at the beginning. Furlaud & Company, Inc. had all the cash over and above the purchase price of the gas properties, that [fol. 329] had come to Kingston Corporation. Furlaud & Company, Inc. also had all of the bonds and notes, and its nominee, Parisette, had all of the gas corporation's corporate stock.

Having come thus far in an analysis of defendant's machinations, it remains to consider if plaintiff in his capacity as a receiver under a creditor's bill, and in a foreclosure suit upon the mortgage securing the bonds, has a standing which will here entitle him to relief against those who defrauded not only the purchasers of the corporate bonds and notes, but also, the gas corporation itself.

Little time need be spent in arguing the question as to what, under other circumstances, might be the ability of Duquesne Gas Corporation to seek recoupment for the wrong practised upon it, having in mind that such corporation was itself party to the wrong done upon the purchasers of its stocks and bonds. That corporation was the creature of Furlaud & Company, Inc. It, in turn, was dominated, controlled and motivated by Furlaud and Reuter. At their behest and procurement, the gas corporation acted as it did. It was they who inflicted upon it the congenital injury that stunted its growth and circumscribed its life. In the belief that the money arising from the sale of the bonds and stock of Duquesne Gas Corporation would be utilized in the development and expansion of its prospects and capacity, the purchasers of such securities were induced to part with their money, a substantial portion of which, instead of reaching Duquesne Gas Corporation, was appropriated by Furlaud & Company, Inc.

In McKee v. Lamon, 159 U. S. 317, the Supreme Court, at page 322, said:

"There can be no doubt of the general proposition that [fol. 330] where money is placed in the hands of one person to be delivered to another, a trust arises in favor of the latter, which he may enforce by bill in equity, if not by action at law."

The intention of the giver of the money rather than that of its receiver is determinative of the purpose to which the fund shall be applied. Nor is it essential that the receiver of the fund shall expressly agree that the money be devoted either to a particular purpose, or to a designated third party. The circumstances under which the payments are made may give rise to the existence of a trust duty upon the part of him who recovers the payment. See Sayer v. Winkoop, 248 N. Y. 54. In that case the defendant, an insurance broker, had obtained a policy of Workmen's Compensation insurance in the State Insurance Fund. The insured corporation made two payments of premiums to the broker. The first of these, but not the second, was remitted to the State Fund. Subsequently, the insured corporation became bankrupt, and the receiver of the concern requested defendant to continue the insurance. Five checks, representing premiums upon the policy were sent to defendant. Instead of transmitting the payments to the State Insurance Fund, the defendant cashed the checks and kept their proceeds. The Court of Appeals held that although the broker had made no express promise to pay over the money to the State Fund, he had received the same as a trustee for such purpose, and that, as a result, the State Industrial Commission could hold him therefor, in an action for money had and received.

[fol. 331] Upon the facts here present, it would seem that the receipt by Furlaud & Company, Inc. of the money that it received upon the sale of bonds of Duquesne Gas Corporation, and which, under the circulars, was represented as being intended for the use of such corporation, should give rise to a trust in favor of that corporation which may be asserted by its Receiver. If it be said that Duquesne Gas Corporation was party to the fraud practiced upon the purchasers of its bond, the answer to the charge has already been made. It is that misconduct of the gas corporation is chargeable directly to Furlaud & Company, Inc., which motivated, dominated and controlled all of the activities of its supine and acquiescent agent of fraud and

deceit. When the gas corporation, at the instance and behest of its master, permitted the latter to retain the sum of $1,554,779.73, it, in effect, made a gift of such sum to Furlaud & Company, Inc. It had no license or authority, as against its note and bondholders, so to dispose of their money. While the disposition that was made of the money was in no sense a secret to Duquesne Gas Corporation, it was, in reality, a secret profit to Furlaud & Company, Inc. In other words, that corporation concealed pertinent facts from the persons who purchased bonds and notes in reliance upon the circulars in which the securities of Duquesne Gas Corporation were offered for sale. In a sense, the situation is analogous to those in which promoters have been held liable for profits accruing to themselves through the misrepresentation of the true value of property conveyed to a corporation, when reliance upon such misrepresentation has been had by innocent purchasers of the stock of the corporation. See Davis v. Las Ovas Com- [fol. 332] pany, 227 U. S. 80; Walker v. Pike Co. Land Co., 139 Fed. 609; cf. Gates v. Megargel, 266 Fed. 811 (C. C. A. 2nd). It is difficult to see how, if at all, the action of Furlaud & Company, Inc. is a whit less reprehensible than the acts of the promoters in the cases just cited.

In considering the right of the Receiver of Duquesne Gas Corporation to maintain this suit, it must be remembered that the receiver represents not only the corporations, but all those having an interest in its properties as well. See Atlantic Trust Company v. Chapman, 208 U. S. 360, 371; Graselli Chemical Company v. Aetna Explosive Company, 252 Fed. 456 (C. C. A. 2nd). To employ the language of the court in Westinghouse Electric & Manufacturing Company v. Binghamton Railway Company, 253 Fed. 378, at page 385, it may be said that

"a receivership is for the benefit and protection of all interests, general creditors, secured creditors (bondholders) and stockholders, and it is the duty of the court, so far as reasonably possible, to conserve and protect all interests."

It has frequently been held that a receiver can disaffirm fraudulent contracts and conveyances which the corporation could not disaffirm, and also, that the receiver can

recover for the wrong that has been wrought upon the creditors. Hamor v. Taylor Rice Engineering Company, 84 Fed. 392; Pittsburgh Carbon Company v. McMillin, 119 N. Y. 46; See Thompson on Corporations, 3rd Ed., Sec. 6436; Smith, Law and Procedure of Receivers, 2nd Ed., Section 357. Although it may be that Duquesne Gas Cor- [fol. 333] poration might not be able, in its own right, to hold Furlaud & Company, Inc. and its masters to accountability for the fraud that was here worked, simple justice requires that the receiver, in his representative capacity, should be able to vindicate the rights of creditors who were victimized. If a court of equity is to function within the domains of conscience, and if it is to redress the wrongs that occur within that dominion, it must provide a remedy that is capable of checkmating the ingenuity that here perpetrated a grievous wrong.

At this point, it may not be amiss to record the genealogy of Furlaud & Company, Inc. Originally incorporated under that name on July 18, 1928, it became known as Furlaud, Reuter & Company, Inc. on August 1, 1930. Upon October 10, 1931, that name was changed to Winchelsea Holding Corporation. Seventeen days later it was dissolved. Throughout the period of its existence, Maxime H. Furlaud, as has been told, was a director, president and principal stockholder of the concern. Also, as has been related, he was a participant in all that gave rise to this suit, and possessed full knowledge thereof. As the guiding spirit, and conscious participant in the wrongs that were done, he incurred liability to the receiver for the trust funds which he diverted from the corporation. Anderson v. Daley, 38 A. D. 505, appeal dismissed, 149 N. Y. 146. In that case, one Daley was a bookkeeper, stockholder, officer and director of Devlin & Company, a business corporation. As trustee under the Will of Albert Ward he deposited moneys of the Ward Estate with the corporation, which subsequently became insolvent. In the meantime, one Jones, another director of Devlin & Com- [fol. 334] pany, died, and the beneficiaries of the Ward Estate brought action to charge the Jones Estate with the balance due to the Ward Estate by the corporation. The Court held that they could recover, saying—

"It (the proof) does, however, clearly establish that Jones was aware of the insolvent condition of the corpo-

ration, and he also had knowledge that moneys of the estate were being furnished by the trustee and used in the business of the corporation. He was an active participant in the use of such moneys. * * * the evidence is clearly sufficient to charge him with knowledge and participation in their use for the business of the corporation, and therefore, for his own benefit; and this is sufficient to charge him with liability. * * * *Nor can he shield himself by the fact that in what he did he acted as an officer of the corporation. The corporation could only act through its officers, and it is not essential that the misuse of the trust funds should be for the exclusive benefit of the person making such unlawful use, or indeed any benefit at all. Where he possesses the knowledge of the misuse of the trust funds, and knowingly applies them either for his own benefit or for the benefit of another, his liability is complete, as the injury to the estate is the same whether he do it as an officer or as an individual. The basis of his liability is knowledge and injury, both of which here exist.*'' (Italics mine.)

[fol. 335] In Virginia-Carolina Chemical Company v. Ehrich, 230 Fed. 1005, it was held that a suit to charge the officers and directors of a corporation with personal liability for the misappropriation by the corporation of money held by it as trustee, was properly brought in equity, upon the theory that the directors were under a duty to exercise reasonable care to supervise the activities of the corporation. The plaintiff, in fact, failed to prove neglect of duty on the part of the defendants in that case, but the implication was clear that they would have been held liable if such neglect had been proven.

The present suit presents a much stronger case for the imposition of liability upon the defendant Furlaud than either of these two cases. The evidence here shows much more than neglect of duty as a director; it shows active participation by the directing personality of the corporation in the transactions which resulted in a misappropriation of money received in trust. Under the foregoing decision, his personal liability is clear.

The defendant, Kingston Corporation, is under a liability for similar reasons. It took part in every step of the proceedings. It received bonds from Duquesne Gas

Corporation and turned them over to Furlaud & Company, Inc. without receiving any consideration therefor. It made a gift to Furland & Company, Inc. of the $565,100, which it had received as part of its consideration for transferring the various gas properties to Duquesne Gas Corporation. It thus knowingly acted as a conduit through which Furlaud & Company, Inc., its sole stockholder, was enabled to appropriate to its own use money intended to be paid over to Duquesne Gas Corporation. As an agent of Furlaud & Company, Inc., that participated in the com- [fol. 336] mission of a breach of trust, it is severally liable to account for the sums diverted. Cf. Iroquois Iron Company v. Kruse, 241 Fed. 433.

The defendants, Byron and Chaucer Corporation, however, are under no liability with respect to the issuance of the bonds and notes since they had no part in any of the transactions through which the trust funds were appropriated.

So far I have dealt only with the profits realized from the sale of the bonds and notes. Plaintiffs also urge that the defendants should be required to account for the profits in the sum of $850,000 which were received by Byron and Chaucer Corporations from the sale of 85,000 shares of the stock of Duquesne Gas Corporation to J. J. Bergen, a dealer in stocks. This stock, although originally issued in the name of Parisette, Furlaud & Company's nominee, was subsequently transferred to Kingston Corporation, which in turn transferred it to Byron and Chaucer Corporations. At the time that the transactions through which Duquesne Gas Corporation acquired the various gas properties were consummated, and for some time thereafter, Furlaud & Company, Inc. owned every share of its capital stock, and ratified and approved of the whole transaction. However much the persons who subsequently purchased stock from Byron and Chaucer Corporations may have been injured, it does not seem that the receiver can recover on behalf of Duquesne Gas Corporation, under the doctrine announced in the case of Old Dominion Copper Company v. Lewishon, 210 U. S. 206. Nor can he recover, as in the case of the bonds and notes, on the theory that the money paid in by purchasers of stock became impressed with a trust in favor of the corporation. This is so for

[fol. 337] the reason that the evidence does not show that any representation was made, by circulars or otherwise, that the money so received would be paid over to Duquesne Gas Corporation. The complaint, therefore, will be dismissed as against the defendants, Byron Corporation and Chaucer Corporation.

Plaintiff may have a final decree against the defendants, Maxime H. Furlaud and Kingston Corporation. There is no necessity for the expense and delay of a lengthy accounting proceeding before a Special Master. Upon the evidence before the court, it is clear that the amount of trust money diverted from Duquesne Gas Corporation was $1,554,779.73; the difference between the $4,492,768.73 realized by Furlaud & Company from the sale of the bonds and notes, and the $2,937,989.00 actually devoted to the legitimate corporate purposes of Duquesne Gas Corporation. There is no occasion to determine any offset to this amount by way of expenses incurred, or reasonable compensation to Furlaud & Company for its activities in connection with the sale of the securities. A trustee is not entitled to be reimbursed for any money which he expends in the course of defrauding his beneficiary. Commonwealth Finance Corporation v. McHarg, 282 Fed. 560 (C. C. A. 2nd).

Decree for Plaintiff against the defendants, Maxime H. Furlaud and Kingston Corporation in the sum of $1,554,779.73.

April 14, 1933.

Jno. C. Knox, U. S. D. J.

[fol. 338] In United States District Court

George W. McCandless, as Receiver of Duquesne Gas Corporation, Complainant,

vs.

Maxime H. Furlaud, Carlos Reuter, Kingston Corporation, Byron Corporation and Chaucer Corporation, Defendants

Present: Hon. John C. Knox, U. S. D. J.

Order That Opinion Stand for Findings, etc.—May 11, 1933

This cause having come on to be heard before the Honorable John C. Knox, one of the Judges of the United States

District Court for the Southern District of New York on the 9th day of November, 1932, and this case having been argued by counsel, testimony and proof having been introduced and the Court having handed down its opinion dated the 14th day of April, 1933, it is hereby

Ordered, adjudged and decreed that the opinion heretofore filed on the 14th day of April, 1933, stand as the findings of fact and conclusions of law in this case and be deemed to constitute the formal decision thereof.

Jno. C. Knox, U. S. D. J.

[fol. 339] In United States District Court, Southern District of New York

E-66-185

George W. McCandless, as Receiver of Duquesne Gas Corporation, Complainant,

vs.

Maxime H. Furlaud, Carlos Reuter, Kingston Corporation, Byron Corporation and Chaucer Corporation, Defendants

Final Decree

This cause came on to be heard at this term, and was argued by counsel; and thereupon, upon consideration thereof, this Court being duly advised in the premises, it is

Ordered, adjudged and decreed, that complainant George W. McCandless, as Receiver of Duquesne Gas Corporation, do have and recover of and from defendants Maxime H. Furlaud and Kingston Corporation, and each of them, the sum of One million, eight hundred thirty four thousand, six hundred forty and 8/100 Dollars ($1,834,640.08), being the amount (including interest to this date) found by the Court to be owing by said defendants to the complainant on an accounting of the matters referred to in the complaint with interest thereon at the rate of six per cent. [fols. 340-372] (6%) per annum from this date, together with his costs and disbursements herein, for which let execution issue, and it is

Ordered, adjudged and decreed, that the bill of complaint herein be and the same hereby is dismissed as to defend-

ants Byron Corporation and Chaucer Corporation on the merits without costs.

Dated, New York City, May 11, 1933.

Jno. C. Knox, U. S. D. J.

[fol. 373] In United States Circuit Court of Appeals for the Second Circuit, October Term, 1933

No. 199

Argued December 11, 1933. Decided January 8, 1934

George W. McCandless, as Receiver of Duquesne Gas Corporation, Complainant-Appellee-Appellant,

v.

Maxime H. Furlaud and Kingston Corporation, Defendands-Appellants-Appellees, and Byron Corporation and Chaucer Corporation, Defendants-Appellees, and Carlos Reuter, Defendant

Appeal from the District Court of the United States for the Southern District of New York

Before Manton, L. Hand, and Chase, Circuit Judges

Suit by George W. McCandless, receiver of Duquesne Gas Corporation, to recover for breach of trust and resulting damages. Decree for the plaintiff against the defendants Maxime H. Furlaud and the Kingston Corporation, and dismissing the bill against the Byron Corporation and Chaucer Corporation. Defendants Furlaud and Kingston Corporation appeal; plaintiff also appeals. Decree reversed, with directions to dismiss the bill.

Ehrich, Royall, Wheeler & Walter, of New York City (Ralph Royall, Bartow H. Hall, and James G. Holland, all of New York City, and William A. Magee, and Clark Miller, both of Pittsburgh, Pa., of counsel), for complainant.

Eppstein & Hirshfield, of New York City (Louis B. Eppstein, Ira W. Hirshfield, and Louis J. Altkrug, all of New York City, of counsel), for appellants Maxime H. Furlaud and Kingston Corporation.

OPINION

MANTON, Circuit Judge:

These are cross-appeals. Furlaud and Kingston Corporation appeal from a judgment of $1,834,640.08 against them for damages for breach of trust. The receiver appeals from a refusal to decree $850,000 more; also from the dismissal of the suit against the Byron Corporation and Chaucer Corporation.

The plaintiff was appointed receiver of the Duquesne Gas Corporation in the Western District of Pennsylvania, having been appointed such on a stockholder's bill and a consent thereto by the Duquesne Gas Corporation. The bill of complaint, in this suit, alleges the appointment in the Western District of Pennsylvania, on January 19, 1932, stating that the receiver was appointed "of all the assets and property, including choses in action, of said Duquesne Gas Corporation, and the complainant has duly qualified and is now acting as such Receiver; that upon petition of the complainant as such Receiver duly filed in the United States District Court, in and for the Southern District of New York, an order was duly made on the 23rd of March, 1932 by said last mentioned Court appointing said complainant George W. McCandless, as Ancillary Receiver of [fol. 374] Duquesne Gas Corporation which last mentioned order duly authorized the complainant, as such Receiver, to bring this suit, and the complainant has duly qualified and is now acting as such Ancillary Receiver."

The answer of the defendants denied this allegation and required proof thereof. The order appointing the plaintiff ancillary receiver after reciting the appointment in the Western District of Pennsylvania reads:

"Ordered, adjudged and decreed that George W. McCandless be and he is hereby appointed ancillary receiver of Duquesne Gas Corporation in and for the Southern District of New York to carry into force and effect the order of the court of original jurisdiction, and it is further

"Ordered, adjudged and decreed that said ancillary receiver is hereby authorized to bring an action against the promoters of said corporation * * * for an accounting and for the restitution of funds * * *"

The substance of this bill is that the banking house of Furlaud & Co., Inc., of which the defendant Furlaud was

president, received the proceeds of a public sale of securities of the Duquesne Gas Corporation in a fiduciary capacity, for that corporation, and became accountable as a trustee but, instead of accounting for the fund, diverted and misappropriated about one-half of the moneys received; that they caused the corporation Furlaud & Co., Inc., to be dissolved; that the defendants Kingston Corporation, Byron Corporation, and Chaucer Corporation were dummy corporations, used in attempting to cover up diversions and misappropriations.

This claim arises out of the following facts: Furlaud & Co., Inc., of New York City with offices there, early in 1930, with the defendant Furlaud, carried on a banking business. He and one Reuter, not served with process, were the chief stockholders and with other employees, directors, and officers, early in 1930, negotiated with the owners of nine gas properties located in the Pittsburgh, Pa., region and obtained options, without consideration, for their purchase by the Kingston Corporation. They employed an engineering firm, and about February 1, 1930, it made written reports appraising five of the properties at $1,700,000. These were purchased at about $1,300,000. The other four properties were appraised by other engineers at $5,000,000 in February, 1930, and the purchase price was about $1,200,000. Thereupon the Duquesne Gas Corporation was organized in Pennsylvania with 1,000 shares of no par value. In February, 1930, it was arranged with the various optionors for the execution of the assignments of the various gas properties by placing instruments of conveyance in escrow with banks located in Pittsburgh and Washington, Pa., and other convenient places. The instruments of conveyance, as deposited, ran to the gas corporation as transferee. The deposit agreement provided that the escrow banks, when notified by Furlaud, were to present drafts upon the Duquesne Gas Corporation for the respective balances of the purchase price, payable in New York, and that the banks, upon having telegraphic advices from their correspondent banks in New York that the drafts had been accepted, were to deliver the conveyances to named persons being the employees of the firm of attorneys who were in charge of carrying out the corporate proceedings. The aggregate balance of the purchase price of the nine properties payable under the escrow agreements was $2,449,900.

There was organized a bankers' syndicate and a distributing group for the issuance and sale of $4,000,000 of Duquesne Gas Corporation first mortgage 6 per cent. convertible gold bonds. Furlaud & Co., Inc., were the syndicate managers and, with four other banking houses, publicly announced the issue for sale on March 25, 1930, and about forty dealers in securities became the distributing group and sold the bonds. They were offered at 97½ and the distributing group were given 4 per cent. commission. Necessary proceedings were taken for the authorization of the bond issue, with a corporate mortgage to secure it, and for an issue of $1,000,000 of notes and for an increase of the capital stock from 1,000 shares to 1,250,000 shares without par value. The security for the bond issue was a mortgage covering the properties. It was out of these funds that payments for the oil properties were made. In our disposition of the case, it is sufficient to say that the net proceeds from the sale of the $4,000,000 bond issue is shown to have been $3,631,671.04; from the sale of the total note issue, $861,097.69; from the sale of 85,000 shares of stock, $850,000—a total of $5,342,768.23. The cost of the properties, including the working capital put in by the bankers, amounted to $2,937,989. It is shown that the amount received by the bankers from the bonds, notes, and stocks now [fol. 375] claimed to have been diverted and misappropriated to their own use, is $2,404,779.73. Whether this was a misappropriation of the funds or a legitimate profit we need not now decide.

The legal sufficiency of the appointment of the plaintiff as an ancillary receiver in the Southern District of New York was put in issue by the answer and he bears the burden of establishing its legality. Grant v. Leach & Co., 280 U. S. 351, 50 S. Ct. 107, 74 L. Ed. 470. The record of the ancillary proceedings in evidence consisted of: (a) A petition of the receiver, captioned "Frank T. Harrington, Complainant, against Duquesne Gas Corporation, Defendant," in the United States District Court for the Southern District of New York and annexed to the petition; (b) the amended bill of complaint filed in the Western District of Pennsylvania, captioned "Frank T. Harrington, Complainant, against Duquesne Gas Corp., Defendant"; (c) amendment to the prayer for relief in the action in the Western District of Pennsylvania; (d) answer of the de-

fendant in the action referred to in (b); (e) a certified copy of the resolution of the board of directors of the Duquesne Gas Corporation, annexed to the answer filed in the Western District of Pennsylvania; (f) the answer of the defendant Duquesne Gas Corporation filed in an action brought in the Western District of Pennsylvania, by the trustee under the first mortgage of the Duquesne Gas Corporation; (g) the decree entered in the Western District of Pennsylvania; (h) a certificate of the clerk of the District Court for the Western District of Pennsylvania, certifying that a receiver's bond of $50,000 had been filed. On these papers the District Court for the Southern District of New York appointed the plaintiff ancillarly receiver of the Duquesne Gas Corporation in this district, and authorized this suit ti be brought against the promoters of the corporation for an accounting and for the restitution of funds, fraudulently diverted and misappropriated, and for secret and excessive profits. Thus, upon the petition alone of a foreign federal receiver, an ancillary receiver is appointed, where no bill had been filed in the jurisdiction by any party aggrieved praying for such relief. No process was issued in this jurisdiction and there has been no appearance or answer filed by the corporation within the district. This suit was instituted shortly after such appointment.

It has long been settled that an equity receiver is an officer of the court appointing him and, as such, he has no status and cannot be sued in a district other than the one in which he was appointed and he cannot recover property or assets of the corporation in receivership even though he may have been authorized to do so by the court of his original appointment. Booth v. Clark, 17 How. 322, 15 L. Ed. 164; Sterett v. Second Natl. Bank, 248 U. S. 73, 39 S. Ct. 27, 63 L. Ed. 135; Great Western Mining & Mfg. Co. v. Harris, 198 U. S. 561, 25 S. Ct. 770, 49 L. Ed. 1163; Hale v. Allinson, 188 U. S. 56, 23 S. Ct. 244, 47 L. Ed. 380. Nor may foreign receivers sue outside the district as a matter of comity even by obtaining permission before suit is commenced. Moore v. Mitchell, 281 U. S. 18, 24, 50 S. Ct. 175, 74 L. Ed. 673; Fowler v. Osgood, 141 F. 20, 4 L. R. A. (N. S.) 824 (C. C. A. 8). Moreover, the usual practice is to obtain an ancillary receiver by an independent bill requesting it. Indeed, it has been said that such an independent bill is required. Mercantile Trust Co. v. Kanawha

Ry. Co. (C. C.) 39 F. 337. Even if there are assets in the foreign jurisdiction, the court there has a right to appoint a receiver only in a pending suit where independent relief is asked. To permit a foreign receiver to obtain an ancillary appointment, on an ex parte application, improperly avoids the rule denying foreign receivers the right to sue in the foreign jurisdiction. The appointment of such receiver does not give him authority to acquire possession of property beyond the jurisdiction of his appointment. The right of a receiver to sue in a foreign court cannot be upheld as a mere incident to the office of a receiver. The appointing court cannot clothe him with such power and any attempt to confer any such authority on him is futile. Hilliker v. Hale (C. C. A.) 117 F. 220; Greene v. Star Cash & Package Co. (C. C.) 99 F. 656; In re Brant (C. C.) 96 F. 257; Mercantile Trust Co. v. Kanawha Ry. (C. C.) 39 F. 337. The authority to sue is sufficiently raised by the denial of the allegation that the receiver was duly appointed. Grant v. Leach & Co., 280 U. S. 351, 50 S. Ct. 107, 74 L. Ed. 470; Fairview, etc., Co. v. Ulrich, 192 F. 894 (C. C. A. 7).

While ancillary receiverships are usually conducted in the spirit of comity, with a view of avoiding unnecessary conflict in the administration of the trust, they are, how- [fol. 376] ever, in all respects the proceeding in two respective causes, each resting upon its own distinct basis. Ancillary proceedings are independent suits and there must be a plaintiff and a defendant and the first must be one who claims injury committed by the defendant. One who is not aggrieved cannot come into court and ask for the appointment of an ancillary receiver. Lack of title to the property is more than a mere technicality. It involves the very substance of a right to file the independent bill. Street's Equity Practice, vol. 3, § 2542; Walker v. U. S. Light & Heating Co. (D. C.) 220 F. 393. The appointment of the plaintiff as ancillary receiver was void, and he did not acquire, in any of the proceedings, a status to warrant the institution of this suit.

Decree reversed.

[fol. 377] In United States Circuit Court of Appeals, Second Circuit

George W. McCandless, as Receiver, etc., Plaintiff-Appellant,

vs.

Maxime H. Furlaud and Kingston Corporation, Defendants-Appellants; Byron Corporation and Chaucer Corporation, Defendants-Appellees; Carlos Reuter, Defendant

Judgment—Filed Jan. 15, 1934

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On consideration whereof, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be, and it hereby is, reversed with costs to the defendants.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 378] [File endorsement omitted.]

[fol. 379] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 380] Supreme Court of the United States

Order Allowing Certiorari—Filed April 30, 1934

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, limited to the questions pertaining to the validity of the appointment of the petitioner as ancillary receiver, and his right as such to maintain this suit.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 381] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD—Filed May 23, 1934

It is hereby stipulated that the record herein shall omit all except the following portions of the record and proceedings below:

1. Statement under Rule XIII (pages 1-3 of C. C. A. record).
2. Amended bill of complaint (pages 5-18 of C. C. A. record).
3. Answer of Kingston Corporation (pages 45-51 C. C. A. record).
4. The statement that:

"Similar answers were interposed by defendants Maxime H. Furlaud, Byron Corporation and Chaucer Corporation."

5. Plaintiff's Exhibit 1 (pages 183-234 of C. C. A. record).
6. Opinion by Knox, D. J. (pages 318-337 of C. C. A. record).
7. Order that opinion stand for findings (page 338 of C. C. A. record).

[fols. 382 & 383] 8. Final decree (pages 339-340 of C. C. A. record).

9. The usual papers as to the proceedings in the Circuit Court of Appeals as certified by the Clerk thereof to the Supreme Court, including the opinion of Judge Manton in the Circuit Court of Appeals.
10. This stipulation.

Items 6 and 7 are to be included in the record at petitioner's request. Respondents do not approve this inclusion because they feel that the opinion of Judge Knox does not concern itself with the issues upon which this Court granted certiorari.

Dated, New York City, May 17, 1934.

Ralph Royall, Counsel for Petitioner. Louis B. Eppstein, Counsel for Defendants-Respondents.

[fol. 384] [File endorsement omitted.]

Endorsed on cover: File No. 38,504. U. S. Circuit Court of Appeals, Second Circuit. Term No. 11. George W. McCandless, as Receiver of Duquesne Gas Corporation, Petitioner, vs. Maxime H. Furlaud, Kingston Corporation, Byron Corporation, et al. Petition for a writ of certiorari and exhibit thereto. Filed March 28, 1934. File No. 11, O. T., 1933.

(5078-C)